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Supreme Court, U.S.
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NO.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

[redacted]

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
et al.,

PETITIONERS,

V.

THE UNITED STATES OF AMERICA;
THE SECRETARY OF THE INTERIOR;
THE DIRECTOR OF THE MINERALS
MANAGEMENT SERVICE; and
SAMEDAN OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress create an affirmative duty for the Secretary of the Interior in Section 8(g)(3) of the Outer Continental Shelf Lands Act and thereby establish a consistent protocol for protection of federal and state non-renewable resources?

2. Did Congress intend to provide compensation to coastal states for drainage of their oil and gas reserves by payments made to the states under Section 8(g)(2) of the OCSLA and pretermit the states from asserting a proprietary interest.

3. Did Congress provide statutory consequences for a failure of the Secretary of the Interior to honor his duty under Section 8(g)(3)?

4. Did Congress intend to forbid litigation over the interpretation of Section 8(g)(3) of the OCSLA?

LIST OF PARTIES

The following additional parties are not listed in the caption: Cashco Oil Company, Seneca Resources Corporation and Pelto Oil Company. These parties were intervenors in the case below and join in this Petition for Certiorari before this Court.

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OPINION OF THE LOWER COURTS

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The Order of the United States Court of Appeals for the Fifth Circuit denying the Suggestion For Rehearing En Banc dated December 23, 1987, appears in Appendix B to this Petition.

The text of the Opinion of the United States District Court for the Western District of Louisiana rendered December 19, 1986, appears in Appendix C to this Petition and is reported at 656 F.Supp. 1310 (W.D. La. 1986).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was

entered on November 25, 1987. A Suggestion For Rehearing En Banc was denied on December 23, 1987. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

This case involves the direct interpretation of the following statutory provisions, the relevant portions of which are reproduced in Appendix D:

43 U.S.C. §1337(g)(2)
43 U.S.C. §1337(g)(3)

STATEMENT OF THE CASE

Introductory Statement

This case involves the interpretation of the 1986 amendments to the Outer Continental Shelf Lands Act ("OCSLA"). No reading of the bare facts of the history of this case, as found in the ordinary statement of a case, can reveal or even foreshadow its immense public importance. It presents significant questions

affecting the federal-state relationship associated with the production of hydrocarbons from offshore state lands and the outer Continental Shelf. The resolution of the issues presented will ultimately affect the allocation of billions of dollars in oil and gas reserves located under the adjoining lands of coastal states and the United States and will impact future federal-state cooperation in the conservation of these unrenewable resources which are vital to this country's security. If the decisions of the lower courts are allowed to stand, decades of federal-state cooperation in offshore oil and gas operations may be destroyed. The effect of the decision by the Fifth Circuit Court of Appeals is to encourage accelerated exploration, drilling and production activities designed to enhance the short range

financial status of the draining sovereign. This unwarranted and improvident race to production, at the expense of orderly and prudent development, could result in harm to the environment, wasteful drilling of unnecessary wells and lack of prudent conservation practices by leaving valuable hydrocarbons in the ground due to selective completion practices.

In the proceedings below, the Fifth Circuit disregarded the basic tenets of statutory analysis followed by other circuits. In refusing to conduct a meaningful examination of the legislative intent behind the statute at issue, the Fifth Circuit created an analytical conflict between it and the First and Tenth Circuits in similar cases. The result is a decision which defies the will of Congress. In addition, the courts

below have blindly refused to recognize that the congressionally granted rights of coastal states are protected by an express statutory remedy.

In reviewing this application, it is important to bear in mind, that although this case presents the legal issues involved in a factual setting in which the State of Louisiana and its lessees are being denied congressionally mandated protection against drainage of the State's resources by wells on federal lands and the federal government is deriving a resultant economic advantage, the legal issues presented are, in fact, neutral. In this instance, the Secretary's failure and refusal to effect unitization in violation of Section 8(g)(3) of the OCSLA has damaged the State and its lessees, but in future instances, his refusal to follow the congressional mandate will sanction

the loss of federally owned resources. It is predictable that if the Secretary refuses to do his duty when state interests are concerned, states will respond in kind by refusing to unitize. The result is a total frustration of the congressional will and the embracing of imprudent operational techniques which will cause the waste of vital national resources and the misallocation of economic resources to the drilling of unnecessary offshore wells.

HISTORY OF THE CASE

The State of Louisiana granted oil and gas leases to Cashco Oil Company, Seneca Resources Corporation, and Pelto Oil Company (all such lessees together with the State of Louisiana being hereinafter referred to as "Petitioners") affecting State offshore lands. The state leases abut the three-mile territorial

boundary separating state and federal lands. The United States, through the Department of the Interior and the Minerals Management Service, granted oil and gas leases to Samedan Oil Corporation on property immediately adjacent to the state leases. At least three significant oil and gas reservoirs underlie both the state leases and the federal leases. Although the great majority of the oil and gas reserves underlie the state side of the boundary, superior geological structural locations on the federal leases have allowed Samedan to drain Petitioners' oil and gas reserves across the boundary and produce hydrocarbons originally in place in Louisiana through wells on the federal side of the boundary. The Petitioners have not been provided with protection against the continuing drainage and have not been compensated for the past

drainage. The State of Louisiana has been deprived of substantial severance taxes and royalties which would have been attributable to the reserves underlying state lands had the common hydrocarbon bearing area been timely unitized and production equitably allocated. The lessees of the State were also deprived of their share of such production.

The Petitioners sought a declaratory judgment and injunctive relief alleging that the federal government through Samedan is draining the state's mineral resources: (1) in violation of the OCSLA, 43 U.S.C. §1337(g) ("Section 8(g)"), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, Sec. 8002, which imposes a duty on the Secretary of the Interior to effect unitization of common hydrocarbon bearing areas; (2) in violation of an agreed

policy and course of dealing between the United States and the State of Louisiana; and (3) in violation of the correlative rights of the State of Louisiana and its mineral lessees and contrary to the interest of conservation of oil and gas. The suit further alleged that the MMS refused to cooperate with the State in the unitization of these fields. Federal jurisdiction was based on 43 U.S.C. §1333(a)(2)(A), 43 U.S.C. §1349(a)(3) and (b)(1), 28 U.S.C. §1331, 28 U.S.C. §1361, and 28 U.S.C. §§2201 et seq.

The defendants claim that the new Section 8(g) amendments do not impose an obligation on the Secretary of the Interior to exercise due diligence to effect unitization agreements with the Governors of the coastal states and that compensation for drainage is provided for by revenue sharing under Section 8(g)(2).[1]

The District Court found that Samedan is draining hydrocarbons from competitive reservoirs common to both state and federal lands. However, the court ruled that since the extent of the drainage could be calculated and compensated in money damages, there was no irreparable injury. Injunctive relief was denied.

The federal defendants filed a motion for partial summary judgment based on their interpretation of Section 8(g). Samedan filed a motion for summary judgment as to all of Petitioners' claims. The District Court granted both summary judgment motions and, construing the federal defendants' jurisdictional motion as a FRCP 12(b)(6) motion, also granted that motion.

The District Court's decision was upheld by a panel of the Fifth Circuit Court, and rehearing was denied. For the

reasons expressed herein, the Petitioners pray that a Writ of Certiorari issue to review the judgment of the Fifth Circuit.

ARGUMENT

Introduction

In 1953, Congress enacted the OCSLA [2] and the Submerged Lands Act ("SLA")[3] to resolve the dispute over ownership of offshore lands and natural resources therein. Coastal states own and control the lands and natural resources within their respective boundaries (i.e., the greater of three miles from their coastlines or their historic seaward boundaries).[4] The federal government maintains power and control over the outer Continental Shelf (hereinafter referred to as the "OCS"), i.e., that portion of the Continental Shelf lying seaward of state-owned offshore lands.[5]

Although ownership of undersea minerals was allocated between state and federal governments, the SLA and the OCSLA did not resolve the question of how to account for oil and gas originally in place on one side of the boundary line but extracted or drained by wells drilled on the other. Historically, problems of net drainage across federal-state boundaries have been met through the practice of unitization of common reservoirs by federal and state agencies. Unitization is a legal concept designed for the joint operation and production of separately owned oil and gas leases which overlie a reservoir common to more than one lease. Rather than the lease owners competing for the reserves in the common reservoir, risking waste and being required to drill unnecessary wells, each party contributes ratably to the unit development costs and

shares the common unit production on a basis reasonably equivalent to the recoverable reserves beneath its own property. Between 1953 and 1978, 144 federal-state units were formed affecting production offshore of Louisiana.[6]

To abate federal-state dissonance over socio-economic and environmental issues, the OCSLA was amended in 1978 to restructure federal-state roles. Section 8(g), enacted as part of the 1978 amendments, provided that before the Secretary of the Interior could issue a lease within the 8(g) zone (i.e., the area lying three miles seaward of the federal-state boundary), he was required to supply geological, ecological and geographical information to the governor of the affected state. The Secretary was required to confer with the governor and attempt to arrive at an agreement for a

"fair and equitable" distribution of the revenues derived from the lease of any tract that might contain a common oil or gas pool or field. The section mandated that if the federal and state representatives could not agree, the funds were to be deposited in escrow and the right to them litigated in federal district court.

Shortly after passage of the 1978 amendments, disputes arose between the Secretary of the Interior and the states of Texas and Louisiana. The Secretary took the position that the affected coastal states were to be allowed to participate in revenues from leases within the 8(g) zone only to the extent that it was necessary to compensate them for drainage and not for any adverse economic or environmental impact suffered by the coastal states. Louisiana and Texas filed separate actions, asserting, among other

claims, that Congress intended Section 8(g) to compensate the coastal states for the economic and environmental effects of OCS operations.

The United States District Court for the Eastern District of Texas rejected the federal government's contention that Section 8(g) was intended to compensate the coastal states for drainage alone[7] and stated that the failure of Congress to include express statutory language that Section 8(g) revenues were limited to drainage compensation evidenced its intent that the sharing of such revenues had a broader purpose.[8] The case was appealed to the Fifth Circuit Court of Appeals. On June 29, 1984, Judge Mentz issued a similar ruling in State of Louisiana v. Secretary of the Interior.[9] Prior to final judgment in the Louisiana and Texas cases, Congress amended Section 8(g) in

1986. That amendment is the subject of this lawsuit.

The passage of the 1986 amendment was due, in large part, to the desire of Congress, to terminate the litigation over whether Section 8(g) was intended to provide compensation for economic and environmental impacts on coastal states. The revised policy statement[10] to the OCSLA makes it clear that the fixed formula for sharing of revenues created in Section 8(g)(2), which does not address drainage, is the vehicle by which coastal states are to be compensated for adverse economic and environmental impacts related to OCS development through sharing of revenues from bonuses, rentals and royalties derived from federal leases in the 8(g) zone.

Section 8(g)(3), on the other hand, addresses the protection of both the

federal government and the coastal states against the inequitable effects of drainage. That section confirms that unitization or, if appropriate, other royalty sharing agreements, will be the vehicles to assure that each sovereign is made whole for the actual or threatened loss of resources drained by activity of the other. This amendment codified the historical practice of unitization in such situations.

I. Section 8(g)(3): The Secretary's Duty

The newly enacted Section 8(g)(3) of the OCSLA manifesting congressional intent to protect the interests of both states and the federal government provides:

> (3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary

> <u>shall</u> provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2). (Emphasis added.)

This statutory provision imposes a duty on the Secretary to initiate a statutory process looking toward protection of coastal states and the federal government against drainage of oil and gas originally in place beneath their respective lands. Once that process is underway, to say, as the Fifth Circuit did, that the Secretary

"may" frustrate its clear purpose by arbitrarily refusing to exercise diligence and good faith in attempting to effect unitization is, at least, illogical. More importantly, it is to permit defiance of the congressional will. In its opinion, the Fifth Circuit held that the inclusion of "may" in the statute with respect to unitization or other royalty sharing agreements renders the clause totally discretionary. This conclusion - reflexively reached by the Court of Appeals without statutory analysis - conflicts with the analytical approach adopted by other federal circuits faced with the similar determinations of whether, despite use of the term "may", a statute nevertheless creates an affirmative duty.

Proper judicial analysis of "may" in a similar context is presented in the

First Circuit case of Commonwealth of Massachusetts v. Andrus[11], which also involved efforts by the Secretary of the Interior to avoid complying with congressional intent embodied in the OCSLA. At issue was the interpretation of Section 1334 of the OCSLA which, at the time of the operative events in the Andrus case, stated that the Secretary "may" take measures to promote conservation or prevent waste. Secretary Andrus, as Secretary Hodel has done in this case, argued that "may" only authorized him to take such measures and did not compel him to do so. The First Circuit rejected the Secretary's interpretation of "may":

> Under §5(a)(1) as then written, the Secretary's power to take measures to prevent waste and conserve natural resources was prefaced with the word "may", but we think the word as there used was not inconsistent with imposition of a duty. "Where a statute confers a power to be exercised for the benefit of the

public or of a private person, the word 'may' is often treated as imposing a duty rather than conferring a discretion." United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359, 15 S.Ct. 378, 380, 39 L.Ed. 450 (1895); Supervisors v. United States, 71 U.S. (4 Wall.) 435, 18 L.Ed. 419 (1867); Mason v. Pearson, 50 U.S. (9 How.) 248; 13 L.Ed. 125 (1850); Thompson v. Clifford, 132 U.S.App.D.C. 351, 355, 408 F.2d 154, 158 (1968).

In our view, by conferring powers upon the Secretary to provide for "the prevention of waste and conservation of the natural resources of the Outer Continental Shelf," Congress had indicated, even in the earlier legislation, a serious concern with balanced use of all resources in the area. To grant such powers indicated an expectation that reasonable use would be made of them for their intended purpose. Selection of the word "may" reflected Congress's recognition that because of the unforeseeability of the problems that would arise, the Secretary had to have broad discretion in the choice of means. But we feel the provision implied an underlying duty to exercise due diligence that the resources be in fact protected. United States ex rel. Siegel v. Thoman, supra.[12] (Emphasis added.)

The Andrus case is a clear and proper recognition that Congress' expression of a legislative purpose is to be effected and cannot be frustrated by the willful inaction of the Secretary of the Interior or other administrative officials.

The Tenth Circuit Courts of Appeal also addressed the proper judicial analysis of "may" in Nevada Power Co. v. Watt[13]:

> On first impression, Interior's argument - that "may" means "may" - is appealing.
>
> * * *
>
> "'May' ordinarily connotes discretion, but neither in lay nor legal understanding is this result inexorable. Rather, the conclusion to be reached 'depends on the context of the statute, and on whether it. . .was the intention of the legislature to confer a discretionary power or to impose an imperative duty.'" (Citations omitted, emphasis added.)
>
> * * *
>
> Courts have construed "may" to mean "must" when the statutory context and legislative history

so required. (Citations omitted.)

* * *

"'Without question such a construction is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power.'" United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359, 15 S.Ct. 378, 380, 39 L.Ed. 450 (1895) (quoting Minor v. Mechanics' Bank, 26 U.S. (1 Pet.) 46, 64, 7 L.Ed. 47 (1828) (Story, J.)).

* * *

We must interpret the statute to effect its clear purpose. . . and "evidenced congressional intent". . . . The purpose suggested by the Act's structure is seemingly at odds with Congress' use of the word "may". Accordingly, this case is one in which we recognize that "while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,'. . .and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history.". . . .[14]

These cases tell us unmistakably that it is wrong to rule that "may" is purely permissive without fully examining the statutory context and the legislative

history to determine whether Congress intended to establish an affirmative duty. Both the Fifth Circuit and the District Court in this case evaded a thorough examination of the statutory context and legislative history of Section 8(g)(3) by ruling that "may" was purely permissive. Under the decisions in the First and Tenth Circuits, such cursory judicial analysis is unacceptable.

The legislative history of Section 8(g)(3) demonstrates that Congress intended to keep the respective sovereigns whole from drainage by the use of unitization agreements and that the Secretary is under a duty to exercise diligence and good faith to negotiate appropriate protective agreements. The Fifth Circuit's ruling that Section 8(g)(3) is totally discretionary is

completely unsupported by the underlying legislative history.

The Fifth Circuit relied on a virtual footnote to the 8(g) legislative history[15], an unintroduced draft of a bill, while it ignored the extensive legislative history on the bill that was introduced, was debated in committee and on the floor of Congress, and was ultimately enacted. As examples of their disregard of the legislative history, the Fifth Circuit ignored Senator Lloyd Bentsen of Texas, who stated:

> Both the State and Federal oil and gas will be protected from drainage by unitization or other royalty sharing agreement.[16] (Emphasis added.)

The Fifth Circuit even ignored Secretary Hodel, who conceded the mandatory nature of the Section 8(g)(3) process:

> In addition, to the unacceptable sharing of 27 percent of royalty

> revenues, the markup vehicle requires the Secretary to share even more "revenues from production of any potentially common hydrocarbon-bearing area.". . . While it appears to be protection against drainage, it is not expressly so limited, and leaves open the possibility that states will argue for a share of federal taxes. . . While the goal of protecting the states against drainage is sound, this provision is an unworthy attempt to serve that goal.[17] (Emphasis added.)

Numerous other statements of similar impact are found in the full legislative history.[18]

The lower courts have thus ignored the overwhelming weight of remarks by officials who directly commented on 8(g)(3) and spoke in mandatory terms of "will be protected", "ensuring that each party will be 'made whole'", and "requires the Secretary".[19] The lower courts failed to identify any legislative statements that Section 8(g)(3) is discretionary -

let alone totally permissive. As in the <u>Andrus</u> case, the "may" provision of Section 8(g)(3) created an "underlying duty to exercise due diligence" in fulfilling the obligations of the statute. It is of significance in this case that, as compared with the CCSLA provision under consideration in <u>Andrus</u>, Section 8(g)(3) provides the Secretary "shall" initiate its processes. The intent of the Congress - demonstrated both by the statutory context and the strong weight of the legislative history - was to create a mandatory process.

The Fifth Circuit held that the Secretary has no affirmative duty to act to achieve unitization of common potentially hydrocarbon bearing areas, although recognizing the clear intent of Congress to that very effect, which its decision then frustrates:

> Congress contemplated that the Secretary and the Governors <u>would</u> attempt to allocate royalty or unitize production from common reservoirs. . .[20]

The Court nevertheless refused to interpret the statute to effect that intent and held that the Secretary has no duty to exercise due diligence and good faith to effect unitization or other appropriate protection agreements.

In ruling that the Secretary's discretion is absolute and unreviewable, the lower courts have violated the canons of statutory construction that legal effect must be given to all parts of a statute and that a statute must be interpreted to avoid absurd results.[21] If Section 8(g)(3) imposes no duty on the Secretary, he has no motive to unitize in any case in which a revenue advantage can be gained through drainage. The same is true of coastal states. At the present

time situations exist where a state enjoys a structural advantage and is draining federal resources. The decisions of the lower courts encourage this result. If the Secretary fails to use all due diligence to protect the United States against drainage of its resources and resulting loss of revenues, one can envision oversight hearings in Congress. He is no less in dereliction of his congressionally imposed duty, simply because a state's resources are being drained. One must ask why Congress even bothered to enact 8(g)(3) if the Secretary has no duty. The lower courts' decisions have emasculated 8(g)(3), and virtually excised unitization from the CCSLA, a patently absurd construction which frustrates congressional intent.

II. Section 8(g)(2) Revenue Sharing Does Not Compensate For Drainage

Petitioners submit that it is imperative that the statutory source of drainage protection or compensation be expressly identified. It is undisputed that Congress intended that the federal government and the coastal states be protected against the inequitable effects of drainage.[22] If there is no meaningful protection in a discretionary 8(g)(3), what provision of the statute protects both governments against drainage?

The Fifth Circuit declared that because of its interpretation that Section 8(g)(3) is totally discretionary it "decline[s] to address Louisiana's underlying contention that state revenues derived from Section 8(g)(2) do not include drainage compensation. . . ."[23] If drainage compensation is not encompassed in 8(g)(2), and the Secretary, at

his whim, can refuse to entertain unit negotiations, the respective sovereigns and their lessees will be totally uncompensated for and unprotected against drainage of their hydrocarbons. This result defies the will of Congress.

In apparent justification of its holding that Section 8(g)(3) is absolutely discretionary, the Fifth Circuit stated: "The states are assured of substantial compensation by Section 8(g)(2)."[24] If that Court intended that the quoted sentence have any relationship to drainage, it failed to provide any plain meaning analysis or legislative history to buttress its belief despite the considerable significance of this utterance. By withholding their analysis, the Fifth Circuit has denied the Petitioners the opportunity to refute the judicial reasoning. However, a brief

examination of Section 8(g)(2) and the payments made thereunder will demonstrate the purpose of these payments and their relationship to this Section 8(g)(3) action.

The Section 8(g)(2) compensation pool is comprised of all bonuses, rents and royalties derived from production from the area between a coastal state's seaward boundary and a line three miles further seaward of that boundary. These revenues are shared in the proportion of twenty seven percent to the state and the remainder to the federal government.

Congress intended that these payments would address socio-economic and environmental impacts.[25] The legislative history demonstrates that such payments were not designed as compensation for drainage.[26] Indeed, it is clear that Congress intended that Section 8(g)(2)

payments would be "in addition to" drainage protection.

III. Statutory Consequences For Violating Section 8(g)(3)

While accurately articulating the intent of Congress that the Secretary and the Governors ". . . would attempt to . . . unitize production from common reservoirs. . . " the Fifth Circuit is totally incorrect in stating that there are no statutory consequences for the Secretary's refusal to comply with that intent. The Fifth Circuit has ignored the fact that Section 1349 of the OCSLA is a generic enforcement provision established to remedy all violations of the OCSLA, including Section 8(g)(3). OCSLA violations are addressed by Section 1349(a)(1):

> . . .any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf <u>to compel compliance with this subchapter against any person, including the United</u>

> States, and any other government instrumentality or agency. . . for any alleged violation of any provision of this subchapter. . . . (Emphasis added.)

Section 8(g)(3) provides the legal duty: that the Secretary would, with Governors of affected coastal states, ". . .attempt to allocate royalty or unitize production. . . ." The "statutory consequences" for the Secretary's violation of this duty are established in Section 1349, *i.e.* a person may seek an order compelling the Secretary to comply with the violated provision of the statute. This is precisely what the Petitioners have done in this suit. Louisiana brought suit pursuant to Section 1349, requesting that the Secretary be compelled to comply with his duty under Section 8(g)(3). Therefore, the Fifth Circuit was factually and legally in error in stating no statutory consequence exists

to remedy the Secretary's violation. Where there is a right, there is a remedy.[27] The rights created throughout the OCSLA - including 8(g)(3) - are protected by the remedy of Section 1349.

IV. Resolution Of Section 8(g) Dispute

The lower courts misread and misunderstood the congressional commentary concerning the legislative desire finally to resolve the Section 8(g) controversy. The Fifth Circuit stated that the 1986 amendments to Section 8(g) were intended to ". . .permanently settle disputes over OCS revenues."[28] This is not a dispute over OCS revenues or compensation. It is a suit to require the Secretary to comply with his Section 8(g)(3) duties. Therefore, the fact that the new act definitively established the components of future OCS revenues to be paid under Section 8(g)(2) does not affect this suit.

Congress intended to pass and did pass a bill which would finally and forever resolve the ambiguities of the 1978 version of Section 8(g). The issues which Congress intended to resolve are identifiable[29], did not include any dispute over or reference to protection of states and the federal government against drainage through the use of unitization agreements.

The Fifth Circuit cites Senator Johnston for the proposition that somehow the statute forbids this litigation.[30] The Fifth Circuit neglected to honor the full context of the Senator's comments quoted in its opinion. Just prior to stating that the legislation settles the "entire issue", Senator Johnston listed the components of the "entire issue": First - The amount of money in the escrow account and the percentages of division.

Second - The inclusion of existing royalties. Third - The inclusion of future royalties and the inclusion of revenues from all leases, whether issued before or after 1978 and whether the lease is wholly or partially within the outer limits of the 8(g) zone. Fourth - Recoupment provisions. After listing the issues and describing their legislative solution, the Senator concludes that the legislation will resolve <u>those</u> issues. He did not say that 8(g)(3) is, in effect, wasted congressional breath and that a party is forbidden to seek judicial relief from the Secretary's arbitrary refusal to comply with it.[31]

The lower courts held, in effect, that Congress can enact a new substantive statutory provision such as Section 8(g)(3) and then forbid any litigation over the ambiguities of that provision.

Such a result is, of course, absurd. Congress, in resolving the ambiguities of the 1978 statute, also enacted a new Section 8(g)(3) which contains an unresolved ambiguity. An attempt by Congress to deny judicial review of its own legislation would violate fundamental concepts of the doctrine of separation of powers. Judicial interpretation inferring such an intent is a rank abdication of the judicial power which denies the judicial review provided by Congress.

CONCLUSION

The precedential effect of this decision will have a direct impact on the financial and operational relationship between the federal government and coastal states in exploration, development and production of natural resources. If the decisions of the lower courts are allowed to stand, the result will be the drilling

of completely unnecessary wells designed only to accelerate production rates at the risk of injury to our environment, waste of natural resources, and misallocation of economic resources to drill unneeded wells. The sovereigns will be denied the proceeds attributable to their hydrocarbons which would have been realized pursuant to unitization agreements.

Congress did not intend this result. The Fifth Circuit's analysis of the use of "may" in Section 8(g)(3) violates the analytical precepts used by the First and Tenth Circuits in the Andrus and Watt cases, thus creating a conflict among the circuit courts of appeal. The failure of the Fifth Circuit to identify the statutory source of drainage protection in Section 8(g) could operate to deprive both sovereigns of congressionally intended protection. Last, the attempt by

the Fifth Circuit to forbid litigation over new substantive provisions of Section 8(g) violates the basic constitutional guarantees of the separation of powers and is a misinterpretation of the intent of Congress. For these reasons, the Petitioners submit that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT L. BOESE, Counsel of Record for Cashco Oil Company, Seneca Resources Corporation, Pelto Oil Company and The State of Louisiana, Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Petition for Certiorari have been served on this 5th day of February, 1988, each of the following, in each case by deposit of the copies to be served in a United States post office in Lafayette, Louisiana, with first class postage prepaid, properly addressed as follows:

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Offshore Minerals &
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Department of The Interior
18th & C Streets, NW
Washington, D.C. 20240

It is hereby certified that all parties required to be served with the foregoing Petition for Certiorari have been listed and served as of this 5th day of February, 1988, in the manner described hereinabove.

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FOOTNOTES

1 See the discussion of Section 8(g)(2) payments at pages 30-33 herein.

2 43 U.S.C. §§1331 <u>et seq</u>.

3 43 U.S.C. §§1301-1315.

4 <u>United States v. State of Louisiana</u>, 382 U.S. 288, 86 S.Ct. 419 (1965).

5 43 U.S.C. §1332(a).

6 Hearings On The Distribution Of Outer Continental Shelf Section 8(g) Revenues In Response To Instructions From The Budget Resolution Before The Senate Committee On Energy & Natural Resources, 99th Cong., 1st Sess. 68 (1985). (Hereinafter referred to as the "Senate Energy Committee, p. ______.")

7 <u>State of Texas v. Secretary of the Interior</u>, 580 F.Supp. 1197 (E.D. Tex. 1984).

8 580 F.Supp. 1197, at 1207.

9 <u>State of Louisiana, Ex Rel. William J. Guste, Jr., Attorney General v. James G. Watt, Secretary, United States Department of Interior and United States of America</u>, Civ. Act. No. 79-2965 (E.D. La. 1984). On September 3, 1985, Alaska also filed suit against the United States over the distribution of Section 8(g) revenues. Alaska's claims were very similar to Louisiana's.

10 The purpose of the amendments was described by Congress:

> [T]he distribution of a portion of the receipts from the leasing of mineral resources of the Outer Continental Shelf adjacent to State lands, as provided under Section 8(g), will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources. (Emphasis added). Pub. L. No. 99-272, §8002.

11 594 F.2d 872 (1st Cir. 1979).

12 Id. pp. 889-890.

13 711 F.2d 913 (10th Cir. 1983).

14 Id. pp. 920-921. Because of space restrictions in this application, discussion of the many "may-shall" cases cited in the Andrus and Watt cases is impossible. We commend these to the Court's attention and add the decision by the Fourth Circuit in United Hospital Center, Inc. v. Richardson, 757 F.2d 1445 (4th Cir. 1985), in which a state agency similarly attempted to interpret the word "may", to no avail, in administering Medicare and Medicaid regulations.

15 For legislative support, the Fifth Circuit cited a draft of a Section 8(g) bill prepared by representatives of Alaska which was never introduced. State of Louisiana ex rel. William J. Guste, Jr. v. United States, 832 F.2d 935, 942 (f.n. 15) (5th Cir. 1987). The relative weight of an unintroduced draft of a bill is slight. For example, the Sixth Circuit stated: "Moreover, the language of rejected alternative legislation is not entitled to great weight in construing legislation that was finally passed, since the court has no way of knowing what motivated the legislature to take such action." United States v. Stouffer Chemical Co., 684 F.2d 1174, 1184 (6th Cir. 1982). See also American Medical Association v. Mathews, 429 F.Supp. 1179 (N.D. Ill. 1977).

16 Cong. Rec. S15429 (daily ed. November 14, 1985) (Statement of Sen. Bentsen).

17 Senate Energy Committee, p. 20.

18 The Fifth Circuit also ignored the Merchant Marine and Fisheries Committee report, adopted by the House Budget Committee:

> In approving this provision, the Merchant Marine and Fisheries Committee is aware of the fact that several states and the United States have entered into unitization or other royalty sharing agreements with the Federal Government when it has been determined that the leasing activities by either the federal or State government has resulted

> in the drainage of oil or gas resources underlying the lands of the other party. The Merchant Marine and Fisheries Committee believes that these types of historical arrangements are a satisfactory method to be followed in ensuring that each party is "made whole" for the loss of resources which belong to the other. (Emphasis added.)

H. Rep. No. 300, 99th Cong. 550 (1985).

The "historical arrangements" referred to in the preceding statement are the traditional use of unitization agreements by the federal government and coastal states.

19 See text at pp. 25-26 and footnote 18, supra.

20 832 F.2d at 941.

21 See e.g., United States v. American Trucking Association, 310 U.S. 534, 60 S.Ct. 1059 (1940); Almendarez v. Barrett-Fisher Company et al., 762 F.2d 1275 (5th Cir. 1985); United States v. Second National Bank of North Miami, 502 F.2d 535 (5th Cir. 1974). See also 1A C. Sands, Sutherland Statutory Construction, §25.03, at 299 (4th ed. 1972).

22 This is best seen in the written comments of Senators Evans and Metzenbaum, two of the harshest critics of the 8(g) law:

> We have no objection to compensating states for drainage

> of oil and gas from their land caused directly by federal drilling activity within the 8(g) zone.

S. Rep. No. 146, 99th Cong. 1st Sess. 272, 274 (1985).

23 832 F.2d at 941.

24 *Id*. at 941.

25 See, *e.g.*, the comments of Senator Wilson at 131 Cong. Rec. S15430 (daily ed. November 14, 1985) (statement of Sen. Wilson).

26 Senators Evans and Metzenbaum unsuccessfully attempted to amend the bill to exclude royalties attributable to the 8(g) zone from the 8(g)(2) compensation pool. Senator Bentsen, in floor debate on the proposed Evans-Metzenbaum amendment, recognized that 8(g)(2) payments are distinct from drainage compensation:

> Mr. President, the State must be permitted to share royalty income *in addition to* drainage compensation. Current law specifically says that royalties are to be shared. That right is not limited in the statute to drainage. It is in fact possible that the refusal to share at least past royalties with the States would be unconstitutional. (Emphasis added.)

131 Cong. Rec. S15429 (daily ed. November 14, 1985) (statement of Sen. Bentsen).

Government officials who opposed various sections of the bill understood that Section 8(g)(2) payments do not include compensation for drainage. For example, recall the previously quoted comments of Secretary Hodel on the provision of the markup bill which ultimately became Section 8(g)(3):

> In addition to the unacceptable sharing of 27 percent of royalty revenues [which was eventually confected as Section 8(g)(2)], the markup vehicle requires the Secretary to share even more revenues from production of any potentially common hydrocarbon-bearing area. (Emphasis added.)

Senate Energy Committee, p. 20.

Senator Gorton of Washington, in support of the Evans-Metzenbaum amendment, stated:

> The Energy Committee's [8(g)(2)] provision [which is virtually identical to the form ultimately enacted] would give coastal states 27 percent of the rents, bonuses and royalty revenue for oil and gas tracts lying wholly or partially within the 8(g) zone - an area 3 to 6 miles off the coast of most states. Under the Energy Committee's scheme, these revenues would be given to the states regardless of whether a common pool of oil or gas existed.

In other words, this provision would no longer be a mechanism to compensate states for drainage losses. (Emphasis added.)

131 Cong. Rec. S15425 (daily ed. November 14, 1985) (statement of Sen. Gorton).

27 The District of Columbia Circuit Court of Appeals has stated:

When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates. (Citations omitted.)

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration, 740 F.2d 21, 32 (D.C. Cir. 1984).

28 832 F.2d at 941.

29 For example, the Secretary described the issues as: (a) The possible inclusion of taxes in the 8(g)(2) compensation fund; (b) Recoupment of proceeds which the Secretary failed to escrow in the old 8(g) account; (c) Inclusion of royalties in the compensation fund; and (d) Proration of tracts partially within the outer boundary of the 8(g) zone and partially outside that zone. Senate Energy Committee pp. 34-35, pp. 37-40.

30 The Fifth Circuit stated:

> Senator Johnston, one of the sponsors, made this objective [i.e. settling disputes over OCS revenues] clear:
>
> [T]he committee legislation settles the entire issue, and thus avoids the inevitable recurrence of future disputes over future 8(g) revenues. . . .
>
> * * * * * *
>
> Although this legislation offers the States considerably less than they sought, we feel it is a fair and equitable resolution. We believe this legislation will end current and future litigation over the 8(g) issue, and by giving the States a small stake in revenues from a small area of the OCS, will actually spur OCS development.
>
> 131 Cong.Rec. S15,438 (daily ed. Nov. 14, 1985) (Emphasis added). This intention was stated by other senators as well.

State of Louisiana ex rel. Guste v. U.S., 832 F.2d 935, 941-942 (5th Cir. 1987).

31 131 Cong. Rec. S15437 (daily ed. November 14, 1985) (statement of Sen. Johnston).

EDITOR'S NOTE

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87-1317

NO. ____________

Supreme Court, U.S.
FILED
FEB 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,
et al,

PETITIONERS,

V.

THE UNITED STATES OF AMERICA;
THE SECRETARY OF THE INTERIOR;
THE DIRECTOR OF THE MINERALS
MANAGEMENT SERVICE; and
SAMEDAN OIL CORPORATION

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

APPENDIX A

JUDGMENT AND TEXT OF OPINIONS OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4106

D.C. Docket No. CV-86-0924-L

STATE OF LOUISIANA ex. rel.
WILLIAM J. GUSTE, JR., Attorney
General,

Plaintiff-Appellant,

and

CASHCO OIL CO., ET AL.,

Intervenors-Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Western District of Louisiana

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant and intervenors-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 25, 1987

ISSUED AS MANDATE:

STATE OF LOUISIANA ex rel.
William J. GUSTE, Jr., Attorney General
Plaintiff-Appellant,

and

Cashco Oil Co., et al.,
Intervenors-Appellants,

v.

UNITED STATES of America, et al.,
Defendants-Appellees,

No. 87-4106.

United States Court of Appeals,
Fifth Circuit.

Nov. 25, 1987

Appeal from the United States District Court for the Western District of Louisiana.

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

Louisiana sued the United States and a federal lessee operating on the Outer Continental Shelf for violations of the Outer Continental Shelf Lands Act, 43

U.S.C. § 1331 et seq. (1986), and an alleged policy agreement between Louisiana and the United States. The district court entered summary judgment for the United States and its lessee, 656 F.Supp. 1310. We affirm.

Pursuant to a federal lease, the Samedan Oil Corporation ("Samedan") conducts an offshore drilling operation on federal Outer Continental Shelf ("OCS") territory which borders the Louisiana offshore boundary. The leased federal tract is adjacent to state tracts leased by the Cashco Oil Company, the Seneca Resources Corporation and the Pelto Oil Company (collectively referred to as the "state lessees").

The State of Louisiana sued the United States, the Secretary of the Interior (the "Secretary"), the Director of the Minerals Management Service ("MMS")

(collectively referred to as the "federal defendants") and Samedan seeking declaratory and injunctive relief in connection with Samedan's "imprudent and wasteful spacing, drilling, completion, and production practices" on its federal lease. Louisiana asserted that a common reservoir of natural gas underlay the federal/Louisiana border with 84% of the reserves located on Louisiana territory and 16% on the federal domain and that Samedan was draining state reserves and engaging in wasteful practices with the permission of the federal defendants.

The state raised three causes of action. First, it alleged that the federal defendants have a duty under 43 U.S.C. § 1337(g) (1986) to enter into a unitization agreement[1] with the Governor of Louisiana and sought a temporary restraining order and preliminary and

permanent injunctions limiting Samedan's production. It also sought preliminary and permanent injunctions directing the Secretary to engage in negotiations to achieve unitization with respect to Samedan's lease and a declaratory judgment holding that the Secretary's refusal to unitize violates § 1337(g).

Second, it alleged that the MMS is in violation of a 1975 policy agreement between Louisiana and the MMS and that the MMS is permitting Samedan to operate in violation of this agreement. Louisiana sought the same relief requested in its first cause of action with the exception of the desired declaratory judgment, which differed in that it sought a holding that the MMS was in violation of the policy agreement.

Louisiana's third contention was that Samedan is violating Louisiana's correl-

ative rights by engaging in wasteful production practices and that the federal defendants are in violation of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 et seq., by permitting these practices. It sought a temporary restraining order and preliminary and permanent injunctions limiting the Samedan's production to prevent waste.

The district court granted the state lessees' motion to intervene as plaintiffs and the state lessees adopted the causes of action and relief sought by Louisiana. The court denied Louisiana's motion for a preliminary injunction limiting Samedan's production. The federal defendants and Samedan separately moved for summary judgment and the federal defendants moved to dismiss the section 1337(g) unitization claim under Fed.R.Civ.P. 12(b)(2). The court granted the motions

for summary judgment as to all three causes of action and, after relabeling the 12(b)(2) motion to a motion under 12(b)(6), granted that motion as well.[2] This appeal is taken by Louisiana and the state lessees.

We hold that the Secretary has no duty to unitize under section 1337(g)(3) as amended, that the alleged policy agreement did not create legally enforceable rights and that no evidence is presented that Samedan engaged in wasteful practices. We therefore affirm the judgment below.

I. Unitization Under Section 1337(g) as Amended in 1986

Louisiana contends that section 8(g) of the OCSLA, 43 U.S.C. § 1337(g), as amended in 1986, requires the Secretary to engage in good faith negotiations with the

Governor of Louisiana to achieve unitization of the federal and state tracts upon which Samedan and the state lessees operate. A brief review of the history of section 8(g) is in order.

In 1953, the Submerged Land Act, 43 U.S.C. § 1301 <u>et seq.</u>, was passed giving coastal states the right and power to manage submerged lands adjoining their respective coasts. For most coastal states, including Louisiana, the grant extends seaward for three miles. The enactment of the OCSLA in 1953, 43 U.S.C. § 1331 <u>et seq.</u>, authorized the Secretary of the Interior to issue oil, gas and other mineral leases for the submerged lands of the continental shelf, which begins where the states' jurisdiction ends.

While these statutes established jurisdictional boundaries, they did not

address the issue of drainage. Because oil and gas reserves can straddle the jurisdictional boundary, it is possible for the lessee of one government to drain the reserves located on the other government's territory. Under the common law rule of capture, which we apply to the OCS,[3] the owner of land has the right to capture oil and gas underlying his property, including that which migrates to his property from another's land.

In 1978, Congress amended the OCSLA, adding a new section 8(g), 43 U.S.C. 1337(g),[4] which specifically addressed the administration of federal OCS lands situated between three and six miles offshore (the "8(g) zone"). Section 8(g) essentially established a scheme whereby revenues obtained by a federal lessee operating in the 8(g) zone would be shared in a fair and equitable manner by the

federal government and the coastal state if a determination was made that a common field of oil or gas underlay federal and state territory so as to create a threat of drainage by the federal lessee.[5]

Section 8(g)(1) required that the Secretary provide certain information to the Governor of the affected coastal state at the time that nominations were solicited for the leasing of lands in the 8(g) zone. Section 8(g)(2) provided that the Secretary inform the Governor of potential areas to be leased and that they consult to determine whether these areas may contain common fields of oil or gas. If an area potentially containing a common field was selected for development, the Secretary was required to offer the Governor the opportunity to enter an agreement concerning the disposition of

revenues generated by the federal lessee to permit a fair and equitable division.

Under 8(g)(3) of the 1978 Act, the Governor had 90 days to determine whether to accept the agreement. If the Governor decided to decline the agreement, the Secretary could proceed with the leasing of the area, and under 8(g)(4), the Secretary was required to deposit bonuses, royalties and other revenues attributable to the lease in a separate treasury account until an agreement was reached or a United States District Court determined a fair and equitable disposition of the revenues.

That plan did not work. The Secretary and the governors of coastal states failed to reach agreement, resulting in a balance of $6.1 billion in special treasury accounts by 1986, H.R.Rep. No. 300, 99th Cong., 2d Sess. 547 (1985),

reprinted in 1986 U.S.Code Cong. & Admin.News at 1058. Litigation ensued over the proper allocation of these revenues, but none of these actions were ultimately resolved by the courts.[6] The two sides also failed to agree on the interpretation of § 8(g); the Secretary maintained that the sole purpose of § 8(g) was to compensate for drainage, and the states contended that § 8(g) not only included drainage but also compensation for onshore impacts of OCS development. See State of Texas v. Secretary of the Interior, 580 F.Supp. 1197, 1222 (E.D.Tex.1984).

In 1986, Congress amended the OCSLA to obviate the litigation and disputes and to distribute the impounded revenues in the special Treasury accounts. Comprehensive Omnibus Budget Reconciliation Act of 1985 (Outer Continental Shelf Lands Act

Amendments of 1985), Pub.L.No. 99-272, 100 Stat. 82, 147-51 (1986) ("1986 Amendments"). Louisiana received $572 million on October 1, 1986, together with 27 percent of deposited federal royalties derived from OCS lessees through September 30, 1985 with interest, and $84 million to be paid over a fifteen year period. 1986 Amendments § 8004(b)(1). The acceptance of a payment under this section satisfied and released all state claims against the United States arising under the 1978 version of section 8(g).[7]

The 1986 amendments comprehensively revised section 8(g). The provisions[8] that required the Secretary to offer the Governor of an affected coastal state an opportunity to enter an agreement concerning the disposition of revenues generated from federal lessees, and to deposit these revenues in a separate

Treasury account if no agreement was reached pending a fair and equitable disposition by court adjudication, were abolished. New section 8(g)(2) provides that 27 percent of "all bonuses, rents, and royalties, and all other revenues . . . derived from any lease issued after September 18, 1978" on federal land in the 8(g) zone be transmitted to the coastal state adjoining the federal land.[9] The coastal state receives this 27 percent regardless of whether federal lessees are draining resources from state territory. The remaining 73 percent is transmitted to the United States Treasury. Section 1332, which contains a congressional declaration of policy, was revised to include a new part (4)(B) (the old part (4)(B) was renumbered (4)(C)) which provides that the 27 percent received by states under new section 8(g)(2), "will provide affected

coastal states and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of [OCS] resources."[10]

Section 8(g)(3)[11], which is the focus of this litigation, was amended to provide that the Secretary or the Governor of a coastal state shall notify the other if either determines that a common potentially hydrocarbon-bearing area may underlie the federal and state boundary and that the Secretary shall provide to the Governor notice of current and projected development in the area. Additionally, if the Secretary has, or intends to, lease the area, the Secretary and the Governor may enter into a unitization or other royalty sharing agreement, pursuant to existing law, to share the revenues from production. If no agreement is reached,

the Secretary may proceed with the leasing of the area. If an agreement is reached, the revenue received by the federal government is subject to the 27-73 percent division set forth in section 8(g)(2). The wording of this new section does not require the Secretary to unitize or enter into a royalty sharing agreement with the Governor of an affected state.

Louisiana, however, contends that the amended statute compels the Secretary to enter into a unitization or other royalty sharing agreement. Louisiana argues that the word "may" in the phrase, "the Secretary and the Governor of the coastal State _may_ enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law" (emphasis added), should be read to

require the Secretary to negotiate either a unitization or other royalty sharing agreement. Louisiana views the permissive nature of the word "may" to permit the Secretary to choose the form of agreement but not to allow the Secretary to refuse to enter any agreement.

To reach this conclusion, Louisiana first argues that revenues derived from section 8(g)(2) do not compensate coastal states for drainage but only for onshore economic and environmental damage, and for the costs of development to the state's infrastructure, such as roads and schools. Louisiana then argues that section 8(g)(3) is designed to address the drainage issue, and the meaning of this section, construed in the light of its legislative history, requires the Secretary to negotiate in good faith some form of agreement with the Governor of an

affected coastal state when the possibility of drainage by a federal lessee exists.

We find no merit to Louisiana's construction of section 8(g). Its interpretation is not supported by the congressional purpose which animated the 1986 amendments or by the plain meaning of section 8(g)(3). We decline to address Louisiana's underlying contention that state revenues derived from section 8(g)(2) do not include drainage compensation because our interpretation of section 8(g)(3) makes resolution of that issue unnecessary. Congress contemplated that the Secretary and the Governors would attempt to allocate royalty or unitize production from common reservoirs, but no statutory consequences are provided in the event of failure -- either to agree or attempt to agree. The states are assured

of substantial compensation by section 8(g)(2).

The 1986 amendments were intended to permanently settle disputes over OCS revenues. Under the 1978 version of section 8(g), the Secretary and the Governors of coastal states were in constant disagreement concerning the fair and equitable disposition of OCS revenues, resulting in a $6.1 billion balance in special treasury accounts. The 27 percent allocation in the 1986 revision of section 8(g)(2) was designed to prevent future litigation on this issue. Senator Johnston, one of the sponsors, made this objective clear:

> [T]he committee legislation settles the entire issue, and thus avoids the inevitable recurrence of future disputes over future 8(g) revenues. . . .

* * * * * *

Although this legislation offers the States considerably less than they sought, we feel it is a fair and equitable resolution. We believe this legislation will end current and future litigation over the 8(g) issue, and by giving the States a small stake in revenues from a small area of the OCS, will actually spur OCS development. 131 Cong.Rec. S15,438 (daily ed. Nov. 14, 1985) (emphasis added). This intention was stated by other senators as well.[12]

Congressional desire to eliminate litigation over OCS revenues is clearly reflected by the allocation to the states of 27 percent of all mineral revenues from federal lands, and by the abolition of the provisions requiring the negotiation of revenue sharing agreements and equitable dispositions by court decree of disputed revenues held in treasury escrow

accounts. Louisiana's construction of section 8(g)(3) would emasculate this clear congressional policy by engaging the courts in further litigation over revenue sharing and the determination of whether the Secretary has negotiated unitization agreements in good faith.

The plain meaning and legislative history of section 8(g)(3) also do not support Louisiana's contention that the Secretary is compelled to enter a revenue sharing agreement. While the notification requirements of section 8(g)(3) are cast in mandatory language,[13] the revenue sharing provision is clearly permissive.[14] This language invests the Secretary with discretion to enter into agreements but does not require him to do so. The legislative history supports this interpretation.[15]

Samedan's liability on this cause of action is dependent upon a finding of liability against the federal defendants. The district court correctly granted the federal defendants' and Samedan's motions for summary judgment.

II. The Policy Agreement

As its second cause of action, Louisiana asserts that Samedan is violating, with the permission of the MMS, a 1975 policy agreement between the United States Geological Survey, the predecessor agency to the MMS, and the Louisiana State Mineral Board and Office of Conservation. This alleged agreement created a 4,000 foot buffer zone along the federal/state boundary (2,000 feet per side), set well spacing requirements within this zone, provided for the exchange of drilling permits for wells authorized within the zone and provided

that the party with the largest share of any unit formed within the zone would have the right to set the unit production rates. Louisiana asserts that this last provision implicitly incorporates a duty on behalf of the Secretary to negotiate unitization agreements in good faith.

Louisiana's claim is groundless. The alleged agreement is evidenced by internal memoranda, labeled "tentative" and "unofficial", generated by both parties and by a history of regulation consistent with the terms of this alleged agreement. The district court correctly found that the documents do not create legally enforceable rights either against the federal defendants, because they were never officially adopted, or against Samedan, because they were not published pursuant to the Administrative Procedure Act, 5 U.S.C. §552(a)(1)(D) (1977).[16] We

affirm the summary judgment against Louisiana's claim on the policy agreement.

III. The Correlative Rights Claim

Louisiana contends that Samedan's well spacing and production practices constitute waste and that this activity, along with Samedan's drainage of state resources, violates Louisiana's correlative rights. The state bases its correlative rights claim against Samedan on Louisiana and federal law. Under the OCSLA, Louisiana asserts, the Secretary has a duty to protect correlative rights threatened by its lessees and to unitize federal and state tracts where a violation exists.

Federal law determines our disposition of this issue, rendering the state's claim under Louisiana law groundless. 43 U.S.C. §1333(a)(1)(2); see Rodrigue v. Aetna Casualty and Surety Co., 395 U.S.

352, 356-57, 89 S.Ct. 1835, 1837-38, 23 L.Ed.2d 360 (1969). Section 1334(a) of the OCSLA provides that the Secretary shall prescribe certain rules and regulations and that

> [t]he Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein. . . .

Correlative rights "means the right of each lessee to be afforded an equal opportunity to explore for, develop, and produce, without waste, oil or gas, or both, from a common source." 30 C.F.R. 250.2(i) (1986). The definition of correlative rights excludes claims for drainage losses and is consistent with the rule of capture. Therefore, Louisiana's third cause of action is limited to an assertion that Samedan is committing waste

which the federal defendants have an obligation to prevent through unitization.

The Director of the MMS is authorized to administer the rules and regulations promulgated by the Secretary. 30 C.F.R. 250.1 (1986). The Director has a duty to prevent waste of natural resources by federal lessees. 30 C.F.R. 250.11(a)(1) (1986).[17] This duty does not require the Director to unitize to prevent waste;[18] the unitization regulations are cast in permissive language. 30 C.F.R. 250.51-1, 2 (1986). Other means of preventing waste are available.[19]

The regulations define waste as:

> (1) The physical waste of oil and gas; (2) the inefficient, excessive, or improper use of, or the unnecessary dissipation of, reservoir energy; (3) the locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes or tends to cause reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations or which causes

> or tends to cause unnecessary or excessive surface loss or destruction of oil or gas; and (4) the inefficient storage of oil.

30 C.F.R. 250.2(qq) (1986). Louisiana contends that Samedan's well spacing and production practices tend to cause reduction in the quantity of gas ultimately recoverable.

Assuming that Louisiana or the state lessees would have a cause of action against the Director or Samedan because of waste, this record raises no issue to support such a claim. The closest Louisiana got to this issue was expert testimony given during the hearing on the state's motion for a preliminary injunction that coordinated exploration might enhance the amount of hydrocarbons ultimately recovered. Against that suggestion was detailed proof by Samedan of prudent operations in accord with federal regulations and under substantial

oversight by the MMS. We find no evidence of waste in the record and affirm the summary judgment.

The district court's judgment is AFFIRMED.

FOOTNOTES

1 Mineral Management Service's regulations define the terms "unit agreement" and "unitization." 30 C.F.R. 250.2(hhh) (1986) states:

> "Unit agreement" means an agreement providing for the exploration for and development and production of minerals from OCS submerged lands as a single consolidated entity without regard to separate ownerships and for the allocation of costs and benefits on a basis defined in the agreement.

30 C.F.R. 250.2(jjj) (1986) states:

> "Unitization" means the combining or consolidation of separately owned lease interests for the joint exploration or development of a reservoir or potential hydrocarbon accumulation under the terms of a unit agreement.

2 We do not address the district court's reasoning in granting the relabeled 12(b)(6) motion because we fully affirm the summary judgment.

3 The author of the Preamble to the unitization regulations, 30 C.F.R. § 250.50, stated that "[a] lease does not grant lessees the ownership of minerals in place, and the Law of Capture applies to the development and production of OCS minerals." 45 Fed.Reg. 29,281, May 2, 1980.

4 43 U.S.C. § 1337(g) (1978) specified that:

(g) Leasing of lands within three miles of seaward boundaries of coastal States

(1) At the time of soliciting nominations for the leasing of lands within three miles of the seaward boundary of any coastal State, the Secretary shall provide the Governor of such State--

(A) an identification and schedule of the areas and regions proposed to be offered for leasing;

(B) all information concerning the geographical, geological, and ecological characteristics of such regions;

(C) an estimate of the oil and gas reserves in the areas proposed for leasing; and

(D) an identification of any field, geological structure, or trap located within three miles of the seaward boundary of such coastal State.

(2) After receipt of nominations for any area of the outer Continental Shelf within three miles of the seaward boundary of any coastal State, the Secretary shall inform the Governor of such coastal State of any such area which the Secretary believes should be given further consideration for leasing. The Secretary, in consultation with the Governor of the coastal State, shall then, determine whether any such area may contain one or more oil or gas pools or fields underlying both the outer Continental

Shelf and lands subject to the jurisdiction of such State. If, with respect to such area, the Secretary selects a tract or tracts which may contain one or more oil or gas pools or fields underlying both the outer Continental Shelf and lands subject to the jurisdiction of such State, the Secretary shall offer the Governor of such coastal State the opportunity to enter into an agreement concerning the disposition of revenues which may be generated by a Federal lease within such area in order to permit their fair and equitable division between the State and Federal Government.

(3) Within ninety days after the offer by the Secretary pursuant to paragraph (2) of this subsection, the Governor shall elect whether to enter into such agreement and shall notify the Secretary of his decision. If the Governor accepts the offer, the terms of any lease issued shall be consistent with the provisions of this subchapter, with applicable regulations, and, to the maximum extent practicable, with the applicable laws of the coastal State. If the Governor declines the offer, or if the parties cannot agree to terms concerning the diposition of revenues from such lease (by the time the Secretary determines to offer the area for lease), the Secretary may nevertheless proceed with the leasing of the area.

(4) Notwithstanding any other provision of this subchapter, the Secretary shall deposit in a separate account in the Treasury of the United States all bonuses, royalties, and other revenues attributable to oil and

gas pools underlying both the outer Continental Shelf and submerged lands subject to the jurisdiction of any coastal State until such time as the Secretary and the Governor of such coastal State agree on, or if the Secretary and the Governor of such coastal State cannot agree, as a district court of the United States determines, the fair and equitable disposition of such revenues and any interest which has accrued and the proper rate of payments to be deposited in the treasuries of the Federal Government and such coastal State.

5 The legislative history to the 1978 amendments reveals that Section 8(g) was

> intended to establish a procedure for the orderly and efficient leasing and development of Federal Outer Continental Shelf lands contiguous with state tidelands. While the issue of jurisdiction over offshore lands has been resolved by the U.S. Supreme Court in United States v. Maine, 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975), the problem of drainage of state resources by a lessee operating on the Outer Continental Shelf has not been so resolved.

H.R.Rep. No. 590, 95th Cong., 1st Sess. 144 (1977), reprinted in 1978 U.S.Code Cong. & Admin.News at 1550.

6 State of Louisiana v. Watt, 631 F.Supp. 648 (E.D.La.1985), 5th Cir.

No. 85-3140; State of Texas v. Secretary of the Interior, 5th Cir. No. 84-2422; State of Alaska v. United States, C.A. A-85-502 (D.Ark.), dismissed by stipulation on July 31, 1986.

7 Section 8004(b)(2) provides:

> The acceptance of any payment by a State under this section shall satisfy and release any and all claims of such State against the United States arising under, or related to, section 8(g) of the Outer Continental Shelf Lands Act, as it was in effect prior to the date of enactment of this Act and shall vest in such State the right to receive payments as set forth in this section.

8 43 U.S.C. §1337(g)(2)-(4) (1978).

9 43 U.S.C. §1337(g)(2) (1986) provides that:

> (2) Notwithstanding any other provision of this subchapter, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially until seven years from the date of settlement of any boundary dispute that is the

subject of an agreement under section 1336 of this title entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

[10] The full text of amended §1332(4)(B) reads:

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section

1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources.

11 43 U.S.C. §1337(g)(3) (1986) provides:

(3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

[12] Senator Heflin noted that:

> This proposal, while certainly not perfect, will finally settle the allocation issue in a fair and equitable way. By adopting the Committee proposal, further litigation can be avoided and a workable framework can be established for the future allocation of 8(g) revenues.

131 Cong.Rec. S15,438 (daily ed. Nov. 14, 1985).

> Senator McClure repeated this intention: While the committee could have simply allocated the present amount of revenues in the 8(g) account once we had determined exactly how much should be in there, that would not have resolved the litigation. The result would have been that we would have to go through this same procedure again in 3 years. We decided that would not be a responsible recommendation. If the Senate desires that this issue be resolved, then it should be resolved with finality.
>
> The [Committee] recommendation does just that. It defines the account and provides a clear and unambiguous allocation of future revenues.

131 Cong.Rec.S15,438-39 (daily ed. Nov. 14, 1985).

[13] 43 U.S.C. §1337(g)(3) reads, in pertinent part:

> Whenever the Secretary . . . determines that [a common reservoir]

may underlie the Federal and State boundary, the Secretary . . . shall notify the other party . . . and the Secretary shall provide . . . notice of the . . . status of the tract. . . .[emphasis added]

14 If the Secretary has leased or intends to lease such tract . . . the Secretary . . . may enter into an agreement to divide [production revenues] by unitization or other royalty sharing agreement, pursuant to existing law.

Id. (emphasis added).

15 See 131 Cong.Rec.S15,425 (daily ed. Nov. 14, 1985) (remarks of Senator Johnston). During the development of new section 8(g)(3) the House Interior and Insular Affairs Committee received a proposal from the state of Alaska which would have expressly enabled states to compel the Secretary to unitize common reservoirs. No Representative or Senator offered this draft as a bill or amendment to a bill.

16 This section specifies that:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

* * * * * *

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applica-

bility formulated and adopted by the agency; and

* * * * * *

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

17 This rule provides:

(a) The Director, in accordance with the regulations in this part, shall:

(1) Regulate all operations conducted under a lease or permit and shall issue and amend OCS Orders and other orders and field rules as may be necessary and proper in order to supervise operations and to prevent harm or damage to, or waste of, any natural resource (including any mineral deposits in areas leased or not leased), any life (including fish and other aquatic life), property, or the marine, coastal, or human environment.

18 The author of the Preamble to the unitization regulations stated that "(g)enerally, unitization will not be authorized solely to protect correlative rights." 45 Fed.Reg. 29,281 (May 2, 1980).

19 See, for example, 30 C.F.R. 250.17 (1986), which authorizes the Director to approve well spacing to protect correlative rights.

APPENDIX B

**TEXT OF ORDER OF
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
DENYING THE SUGGESTION FOR
REHEARING EN BANC**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-4106

STATE OF LOUISIANA ex rel,
WILLIAM J. GUSTE, JR., Attorney General

Plaintiff-Appellant,

and

CASHCO OIL CO., ET AL.,

Intervenors-Appellants,

versus

UNITED STATES OF AMERICA,
ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11-25-87, 5 Cir., 198_,
_____ F.2d ____)

(December 23, 1987)

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

(Thomas M. Reavley)
United States Circuit Judge

APPENDIX C

JUDGMENT AND TEXT OF OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

STATE OF LOUISIANA, EX REL
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL

VS. CIVIL ACTION NO. 86-0924 "L"

THE UNITED STATES OF AMERICA;
THE SECRETARY OF THE INTERIOR; THE
DIRECTOR OF THE MINERALS MANAGEMENT
SERVICE; AND SAMEDAN OIL CORPORATION

J U D G M E N T

For the written reasons assigned in the ruling of this date,

IT IS ORDERED that:

1. The motion of defendant Samedan Oil Corp. to strike exhibits is DENIED.

2. The motion for partial summary judgment filed by defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service is GRANTED.

3. The motion for summary judgment filed by defendant Samedan Oil Corp. is GRANTED.

4. The motion of defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service to dismiss for lack of subject matter jurisdiction is construed as a motion to dismiss for failure to state a claim, and is hereby GRANTED.

5. The motion of the plaintiffs, the State of Louisiana, Cashco Oil Co., Seneca Resources Corp., and Pelto Oil Co., to permit disclosure of protected materials to MFG Corporation is DENIED.

6. All other motions are MOOT.

7. This action is DISMISSED WITH PREJUDICE to all rights of plaintiff and plaintiff-intervenors.

Lafayette, Louisiana, December 19, 1986.

(John M. Duhe', Jr.)
JUDGE, U. S. DISTRICT COURT

(Judgment Entered December 22, 1986)

STATE OF LOUISIANA, ex rel.
William J. GUSTE, Jr.,
Attorney General,

v.

The UNITED STATES of America; the
Secretary of the Interior; the Director
of the Minerals Management Service;
and Samedan Oil Corporation

Civ. A. No. 86-0924 "L".

United States District Court,
W.D. Louisiana,
Lafayette-Opelousas Division.

Dec. 19, 1986.

William J. Guste, Jr., Atty. Gen., Gary L. Keyser and Mary Ellen Leeper, Asst. Attys. Gen., Baton Rouge, La., for plaintiff.

Lawrence Moon, Asst. U.S. Atty., Lafayette, La., for USA and Director of the Mineral Management Service.

Lawrence E. Donohoe, Robert K. Reeves, Randall C. Songy, Patrick G. Tracey, Jr. and R. Thomas Jordan, Jr., Onebane, Donohoe, Bernard, Torian, Diaz,

McNamara & Abell, Lafayette, La., for Samedan Oil Corp.

Charles W. Findlay, Lisa Hemmer and Poe Legette, U.S. Dept. of Justice, Washington, D.C., for Land and Natural Resources Div.

George W. Hardy, III, Michael R. Mangham and Louis R. Davis, Broadhurst, Brook, Mangham & Hardy, Lafayette, La., for Cashco Oil Co.

L. Todd Gremillion, Dotson, Babcock & Scofield, Houston, Tex., and Andrew L. Gates, III, Dotson, Babcock & Scofield, Lafayette, La., for Seneca Resources Corp.

B.J. Duplantis, Gordon, Arata, McCollam, Stuart & Duplantis, Lafayette, La., for Pelto Oil Co.

OPINION

DUHE, District Judge.

A celebrated observer of American government once wrote "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." de Tocqueville, Democracy In America 280 (1956 ed.). The validity of that comment, penned more that one hundred and fifty years ago, is demonstrated by this case. This Court is called upon to resolve a suit brought by the State of Louisiana against the United States, the Secretary of the Interior, the Director of the Minerals Management Service (collectively "Federal Defendants"), and Samedan Oil Corporation ("Samedan"). The dispute concerns the depletion of an allegedly common hydrocarbon pool, underlying both state and federal submerged lands. De-

spite the attention of Congress and both Executives, this issue - involving the allocation of potentially billions of dollars of resource generated revenues - now rests before this court on a motion for summary judgment.

Finding no issue of material fact, I am prepared to rule on the outstanding substantive issues. For the reasons outlined below, I hold that monies paid to Louisiana under the 1986 amendments to §8(g) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1331 et seq.,[1] are intended to compensate the state for federal drainage of common hydrocarbon reservoirs. Accordingly, the Secretary of the Interior has no duty under §8(g) to enter into a unitization or royalty sharing agreement to compensate states for drainage losses.[2] I find that Louisiana's

acceptance of funds under §8(g) forecloses any claim for drainage losses.

I further rule that an alleged 1975 policy agreement between the sovereigns provides no basis for this action. Additionally, I find no basis in the doctrine of correlative rights to enjoin Samedan's production of hydrocarbons.

This holding terminates the litigation in this Court. Accordingly, the outstanding nondispositive motions are moot, except for the motion of plaintiff, the State of Louisiana, and plaintiffs-intervenors, Cashco Oil Company ("Cashco"), Seneca Resources Corporation ("Seneca"), and Pelto Oil Company ("Pelto") to permit disclosure of protected materials to MGF Corporation ("MGF"). That motion is denied.

FACTS

West Delta Block 18 is a rectangular tract of ocean approximately fifteen miles east southeast of Grand Isle, Louisiana. This area is divided by a line established by the United States Supreme Court in United States v. State of Louisiana, 422 U.S. 13, 95 S.Ct. 2022, 44 L.Ed.2d 652 (1975). The line was drawn parallel to the Louisiana coastline, three miles offshore.[3] The Submerged Lands Act of 1953, ch. 65, 67 State. 29 (codified at 43 U.S.C. §1301 et seq.), recognized in Louisiana the power to manage, lease, and develop the seabed inside the decree line. The Secretary of the Interior has authority to manage, lease, and develop areas seaward of the line. 43 U.S.C. §1334(a).[4]

In July, 1983 Samedan acquired a federal lease in West Delta Block 18.

This lease, designated OCS-G-5669, is adjacent to State Lease 10088, held by Cashco, Seneca, and Pelto. Samedan completed three wells on it lease and began producing hydrocarbons. The state's lessees also completed producing wells on their leasehold.

Louisiana and its lessees conducted studies which indicated that the penetrated hydrocarbon reservoirs underlay both state and federal lands. Consequently, the State believed that Samedan's wells, allegedly in a structurally advantageous position, were draining gas from beneath State acreage. The defendants contested this claim. The State calculated that 84% of the total recoverable reserves underlay State lands, and that Samedan's position and production rates would permit the recovery of a disproportionate share of the allegedly common

pool. Additionally, the State contended that Samedan's "excessive production rate" would ultimately decrease the total amount of hydrocarbons recovered.

In April, 1986 the State became aware of Samedan's intent to install compression equipment on its wells to increase production, which would aggravate the migration of hydrocarbons. Accordingly, the State filed this suit seeking declaratory and injunctive relief.

The State and its lessees ask for an injunction to: (1) limit defendant Samedan's rate of production "consistent with that proportion of recoverable [gas] reserved underlying the federal portion of the affected reservoirs," and (2) directing the Secretary of the Department of the Interior or to negotiate with the state to achieve unitization of the affected reservoirs.

Plaintiffs also seek a declaratory judgment that the defendants have violated the following: (1) the OCSLA, in particular, 43 U.S.C. §1337(g) ("§8(g)"), as amended by the Comprehensive Omnibus Budget Reconciliation Act of 1986; (2) "an agreed and established policy arising from an informal agreement between the Minerals Management Service ("MMS"), through its predecessor, the United States Geological Survey ("USGS"), and the State of Louisiana, through representatives of the Louisiana State Mineral Board and the Louisiana Department of Conservation; and (3) the correlative rights of the State of Louisiana and its mineral lessees under Louisiana law, allegedly applicable under 43 U.S.C. §1333(a)(2)(A), or alternatively, under applicable federal law.

Federal jurisdiction is predicated on 28 U.S.C. §§1331, 1361, 2201, and 43 U.S.C. §1349(a)(3) and (b)(1).

CURRENT POSTURE

As a preliminary note, the Court finds the existence of a common reservoir to be a disputed issue of fact. However, resolution of that controversy is not material to the disposition of this case.

On May 20, 1986 this Court denied the plaintiffs' motion for a preliminary injunction.[5] Subsequently, the Federal Defendants moved for partial summary judgment on two issues: (1) that payments made pursuant to the 1986 amendments to §8(g) were legislatively intended to compensate Louisiana for drainage claims; and (2) that the parties never entered into a binding agreement concerning regulatory principles.

Samedan, by separate motion, raised the same issues as the Federal Defendants, and additionally sought summary judgment on the plaintiffs' correlative rights claim. This was followed by the Federal Defendants' motion to dismiss drainage claims for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2).

Finally, numerous nondispositive motions were filed, including a motion to strike the plaintiffs' exhibits for failure to comply with Fed.R.Civ.P. 56(e). All outstanding motions were consolidated for oral argument on November 10, 1986.

Federal Defendants' jurisdictional challenge is mislabeled. The basis for dismissal is that Louisiana's acceptance of payment under the 1986 amendments to the OCSLA constitutes a waiver of any damage claim as a matter of law. In accordance with the basic philosophy of the

federal rules, the substance of a 12(b) motion controls over form. 5 Wright & Miller, Federal Practice and Procedure, §1347, n. 99 (1969). Accordingly, we construe this filing as a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6).[6]

LAW AND ANALYSIS

In considering these questions, a preliminary issue was raised by Samedan's motion to strike numerous exhibits attached to the plaintiffs' memorandum in opposition to summary judgment. Samedan does not contest the authenticity of these exhibits, but bases its objection on the plaintiffs' failure to certify the documents as required by Fed.R.Civ.P. 56(e).

In light of the fact that all of the exhibits referred to were produced, authored, or received by one of the defendants, I find the motion to strike to be

meritless. Literal compliance with Rule 56(e) serves no purpose under these circumstances. Cf. Lawson v. American Motorists Insurance Corporation, 217 F.2d 724, 726 n. 3 (5th Cir.1954) (idle formality to require immaterial documents to conform to Rule 56(e)). The consideration of these motions incorporated all evidence and arguments advanced by the parties.

I. THE LEGISLATIVE INTENT

This dispute can be distilled to two issues. Did Congress intend compensation under §8(g)(2) of the amended OCSLA to incorporate drainage losses? Did Congress also grant the Secretary of the Interior unbridled discretion to refuse to negotiate a unitization or royalty sharing agreement under §8(g)(3)? The answers must be drawn from both the text and the context of the legislation.

Justice Cardozo described statutory construction as a choice between uncertainties. Burnet v. Guggenheim, 288 U.S. 280, 288, 53 S.Ct. 369, 372, 77 L.Ed. 748 (1933). However, I believe that a disciplined analysis of this legislation leads to a single conclusion. The starting point in my inquiry is the plain meaning of the statutory language. See Blue Chip Stores v. Manor Drug Stores, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J. concurring). If necessary, a textual interpretation can be measured against legislative history. See American Trucking Associations, Inc. v. I.C.C., 659 F.2d 452, 459 (5th Cir.1981).

In applying these principles of statutory construction to the pronouncements of Congress, I am mindful of the need for caution in reviewing legislative commentary. Id. Undoubtedly, the passage

of the 1986 OCSLA amendments was engendered by different, and perhaps inconsistent, legislative motives. That history does not give the Court license to impose its own policy choice. While we are not confined to the statutory language, we are confined by it, and a presumption exists that the legislature intended the plain meaning of its words. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 543-44 (1947).

The Statute

Section 8(g) of the OCSLA governs federal leasing of submerged lands within three miles of a coastal state's seaward boundary. This area is commonly known as the 8(g) zone. Section 8(g) currently provides for the distribution of twenty-seven percent of the revenue derived from federal leasing activity in the 8(g) zone

to the contiguous state.[7] Section 3 of the OCSLA, the declaration of policy, indicates that this distribution is intended to mitigate adverse economic and environmental effects related to the development of offshore resources.[8]

Section 8(g)(3) outlines notification requirements when either executive determines that a common reservoir may underlie both state and federal tracts. The section goes on to provide for the division of revenues in such a case by agreement incorporating unitization or royalty sharing.[9]

The Arguments

The plaintiffs contend that the mandatory division of revenues under §8(g)(2) is not intended to compensate the states for drainage losses. The argue that the provision of a second revenue sharing mechanism in §8(g)(3), triggered

by a determination that a common pool may exist, would be superfluous if the adverse economic effect described in §3 encompassed drainage losses.

The plaintiffs' position ignores the permissive nature of the revenue sharing authority established in §8(g)(3). Although the notification requirements of §8(g)(3) are cast in mandatory language,[10] the text preceeding the revenue sharing provision is clearly permissive.[11] This language invests the Secretary with discretion to enter into agreements pursuant to §8(g)(3). See generally Knight Newspapers, Inc. v. United States, 395 F.2d 353, 357-58 (6th Cir. 1968).

A characterization of §8(g)(3) as discretionary is consistent with the section's restriction of agreements to those formed "pursuant to existing law". Existing law permits the Secretary to

enter into unitization agreements to protect federal royalty interests and prevent waste of natural resources[12]. It is not unreasonable to interpret §8 (g)(3) as preserving the Secretary's license to enter into voluntary agreements with the states. The Secretary would have discretion to negotiate such an agreement when advantageous to federal interests.

Moreover, a comparison to preamendment §8(g) gives credence to the view that drainage compensation is incorporated in §8(g)(2) scheme. The former version of §8(g), enacted in 1978, provided that the existence of a common reservoir triggered a duty "to enter into an agreement concerning the disposition of revenues which may be generated by a Federal lease within such area in order to permit their fair and equitable division between the state and federal government." 43 U.S.C.

§1337(g)(2), amended by §§8002-8004 of the Consolidated Omnibus Budget Reconciliation Act, Pub.L.99-272, 100 Stat. 147, 148 (1986) [hereinafter, "former §8(g)"]. If the parties could not agree on a "fair and equitable" division, the Secretary was empowered to proceed with leasing. However, former §8(g)(4) required that all revenues be retained in a separate account until agreement was reached or the issue resolved by a U.S. District Court.

Because the 1986 amendments preserved the Secretary's express authority to proceed with leasing in the absence of any agreement, the failure to carry the escrow provision over into the current §8(g)(3) indicates that agreement on revenue sharing is now entirely discretionary. This is consistent with the view that the substitution of the 27%-73% split now mandated in §8(g)(2) for the

"fair and equitable" standard was designed to incorporate drainage compensation.

One of the stated policies of the OCSLA is to make the OCS available "for expeditious and orderly development." 43 U.S.C. §1332(3). The legislative history of the 1986 amendments indicates that a major goal of Congress was to avoid protracted litigation over the meaning of "fair and equitable."[13] This purpose is inconsistent with plaintiffs' position concerning the meaning of §8(g)(3). Congressional substitution of the 27%-73% division for the "fair and equitable" standard could not be perceived to avoid litigation if drainage was to be compensated separately.

I recognize that my analysis is predicated on the understanding that the "fair and equitable" standard incorporated drainage losses. Despite plaintiffs'

contrary position, I am confident that the history and interpretation of the OCSLA confirm that reliance. The legislative history of the 1978 OCSLA amendments clearly indicates that former §8(g) was intended to address drainage concerns. The House Report states: "[§8(g)] is intended to establish a procedure for the orderly and efficient leasing and development of Federal [OCS] lands contiguous with state tidelands. While the issue of jurisdiction over offshore lands has been resolved by the U. S. Supreme Court [,]. . . the problem of drainage of state resources by a lessee operating on the [OCS] has not been so resolved." H.R.Rep. No. 590, 95th Cong., 2d Sess. 144 (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 1450, 1550.

Further evidence that §8(g) was intended to address drainage from state

lands is found in comments by then Secretary of the Interior Cecil D. Andrus. In recommending the "fair and equitable" division of revenue instead of a proposed joint federal-state leasing of 8(g) acreage, Secretary Andrus observed:

> We favor a provision which gives coastal states fair and equitable compensation for oil and gas which is produced through wells in the federal areas adjacent to them, but <u>which is derived from state lands</u>. We believe, however, that special care must be taken not to undermine the Secretary's fundamental responsibilities under the statute and to be as clear as possible about the process under which the State would seek compensation. Thus, in the substitute section we are providing, the references to "joint leasing" have been removed and <u>its principal purpose, compensation for the resource taken from state lands</u>, more clearly brought into focus.

<u>Id.</u> at 219, 220, 1978 U.S.Code Cong. & Admin.News at 1625 [emphasis added].

Additionally, the cases interpreting "fair and equitable" have indicated that drainage is incorporated under the aegis

of §8(g) compensation. State of Texas v. Secretary of the Interior, 580 F.Supp. 1197, 1199-1200 (E.D.Texas 1984); State of Louisiana v. Watt, No. 79-2965-I(2) (E.D.La. October 3, 1984).

Louisiana now claims that its suit under the former §8(g) did not include a claim for drainage compensation. Accordingly, it argues that the compromise of previous litigation by enactment of the 1986 amendments cannot affect its claim for drainage compensation. I disagree with both contentions.

Although the State's complaint in the previous litigation did not specify a drainage claim, responses to interrogatories clearly indicate that the State contended that drainage was an element of its recovery under §8(g). Louisiana also argued that former §8(g) compensation encompassed drainage losses in an amicus

curiae filing in the appeal of the _State of Texas_ litigation.[14]

Regardless of Louisiana's position, I cannot regard Congress' intent to be defined by the pleadings filed in litigation compromised by the 1986 amendments. This argument would lead to the conclusion that Congress intended a different interpretation for each state which sued under former §8(g).[15] Additionally, Congress undoubtedly intended the 1986 amendments to compromise any potential claims by the four states which did not file suits under former §8(g).[16]

Section 8(g)(3) requires that any proceeds generated under a revenue sharing agreement be subjected to the 27%-73% distribution provision of §8(g)(2). Presumably, the terms of any voluntary §8(g)(3) revenue sharing across the State/Federal boundary would compensate

for drainage losses. Because I interpret the division mandated by §8(g)(2) to incorporate drainage compensation, it might appear that voluntary §8(g)(3) revenue sharing affords the states a double recovery.

However, drainage is only a single element of § 8(g) compensation. See State of Texas, 580 F.Supp. at 1221. It is entirely plausible that Congress simply believed that factoring out drainage from the 27% figure posed too much of an obstacle to the operation of a voluntary revenue sharing scheme.

Through §8(g), Congress evidenced a policy regarding the coastal states' remedy for resource drainage by federal lessees on the OCS. That remedy is limited to participation in §8(g)(2) revenue sharing.

II. THE POLICY AGREEMENT

The plaintiffs allege that a 1975 policy agreement concerning regulatory guidelines now binds the United States. The plaintiffs contend that this agreement is evidenced by internal memoranda generated by both parties and a history of regulation consistent with the terms of the alleged agreement.

The alleged policy agreement involves the creation of a buffer zone along the Supreme Court decree line, the exchange of drilling permits for wells authorized within the zone, and the adoption of well spacing requirements in the zone. Additionally, under the alleged policy agreement the party with the largest share of any unit formed within the zone would have the right to set the unit production rates.

These conditions, established in meetings between the U.S. Geological Survey and the Louisiana Department of Conservation, are outlined in a September 19, 1975 internal State memorandum. Identical conditions are incorporated in two internal federal memoranda prepared in 1980. Samedan's operation in West Delta Block 18 violates these terms.

The plaintiffs seek injunctive relief, mandating federal enforcement of the alleged policy agreement. In particular, the plaintiffs contend that the provision relating to the setting of production rates implicitly incorporates a duty to negotiate unitization agreements in good faith.

The plaintiffs contend that factual disputes concerning both the formation of the policy agreement and MMS adherence to its guidelines make this claim inappro-

priate for summary judgment. I disagree. Fed. R.Civ.P. 56(c) requires disputed factual issues be both genuine and material to defeat a motion for summary judgment. See generally Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465. The factual dispute raised by the plaintiffs is clearly not material to the disposition of this claim.

A GENUINE DISPUTE?

The documents offered by the plaintiff do not indicate the existence of any binding MMS policy. The State's September, 1975 memorandum is entitled "preliminary" and characterizes the outlined regulatory conditions as "tentative possible solutions." The U.S. Government memoranda dealing with this subject term the scheme as "unofficial." The plain-

tiffs advance no other evidence, but assert that at trial they will develop proof of a mutual course of conduct consistent with the conditions of the alleged agreement.

The defendants point out that the plaintiffs have not offered any direct evidence of MMS implementation of the regulatory conditions outlined in the 1975 memorandum.[17] The plaintiffs concede that these terms have never been promulgated by the MMS as published rulemaking.

It is clear that effective use of Rule 56 requires us to refrain from defining factual issues by speculation. Schwarzer, 99 F.R.D. at 466. Yet Fontenot v. Upjohn Co., 780 F.2d 1190, 1192 (5th Cir.1986), teaches that inferential evidence can suffice to defeat a motion for summary judgment.

The plaintiff's evidence only marginally raises a factual dispute concerning the existence of an MMS policy as defined in the 1975 memorandum. However, courts ordinarily indulge in presumptions favorable to a nonmovant. Securities and Exchange Commission v. Spence & Green Chemical Company, 612 F.2d 896, 900 (5th Cir.1980). Accordingly, I will assume that a genuine factual dispute exists.

A MATERIAL ISSUE?

To preclude summary judgment, a genuine factual dispute must involve a controlling issue. Anderson v. Liberty Lobby, Inc., --U.S.--, 106 S.Ct. 2505, 2510, 91L.Ed.2d 202(1986). In this case, the factual dispute concerns MMS adoption of the alleged policy agreement. However, I find that proof of a history of consistent regulation cannot entitle the plaintiffs to prevail.

Clearly, the conditions of the 1975 memorandum are designed to "implement, interpret, or prescribe law or policy." See Batterton v. Marshall, 648 F.2d 694, 700 (D.C.Cir.1980). The authority to promulgate rules consistent with those outlined in the policy agreement was delegated to the Secretary in §5 of the OCSLA, 43 U.S.C. §1334. Thus, MMS adoption of the terms of the 1975 memorandum would constitute rulemaking under the aegis of the Administrative Procedures Act ("APA"), 5 U.S.C. §§551 et seq.[18]

However, even if the MMS conceded the 1975 memorandum to accurately reflect its regulatory intentions, those conditions could not be enforced against Samedan. The APA requires agencies to publish certain regulations and guidelines as a prerequisite to enforcement. Agencies must publish in the Federal

Register "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. §552(a)(1)(D).

The conditions outlined in the 1975 memorandum constitute the substance of a regulation imposing specific obligations upon private interests in mandatory terms. As such, these requirements must be either published in the Federal Register or reasonably available and incorporated by reference. See Appalachian Power Company v. Train, 566 F.2d 451, 455 (4th Cir.1977). The terms of the 1975 memorandum have never been so published.

5 U.S.C. §552(a)(1) provides that "a person may not in any manner. . . be adversely affected by a matter required to be published in the Federal Register and

not so published."[19] MMS adherence to the terms of the 1975 memorandum would adversely affect Samedan's West Delta operations. Accordingly, the MMS could not invoke the terms of the unpublished policy in regulating Samedan's operations.

Material factual issues are those which entitle a nonmovant to prevail if favorably resolved. Houston North Hospital Properties v. Telco Leasing, Inc., 688 F.2d 408, 410 (5th Cir.1982). As outlined above, proof of a course of conduct consistent with the terms of the alleged 1975 policy agreement could not support a verdict for plaintiff. Accordingly, summary judgment is appropriate.

III. THE CORRELATIVE RIGHTS CLAIM

The plaintiffs allege that the drilling and production of Samedan's wells has deprived the plaintiffs of a reasonable opportunity to recover an equitable

share of the potentially common pool. The plaintiffs contend that Louisiana law, or alternatively, federal common law, entitles them to an injunction limiting Samedan's production.

The Applicable Law

I find that federal law defines Samedan's production rights on the federal OCS.

The OCSLA extends the "Constitution and laws and civil and political jurisdiction of the United States" to the subsoil and seabed of the OCS. 43 U.S.C. §1333(a)(1). To fill the substantial gaps in the coverage of federal law, the OCSLA provides for the adoption of laws of a state adjacent to the Federal OCS "[t]o the extent that they are applicable and not inconsistent with. . . other Federal laws and regulations of the Secretary" as surrogate federal law. 43 U.S.C.

§1333(a)(2). See Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352, 356-57, 89 S.Ct. 1835, 1837-38, 23 L.Ed.2d 360 (1969). State law is only introduced to the OCS in the absence of relevant Federal law. Id. at 357-58, 89 S.Ct. at 1838; Continental Oil Co. v. London Steam-Ship Owners Mutual Insurance Ass'n., 417 F.2d 1030, 1036 (5th Cir.1969).

Congress has provided controlling federal law in this context. The 1986 amendments to the OCSLA address drainage claims across the state and federal boundary line. Additionally, the OCSLA delegates the power to prescribe rules pertaining to OCS production to the Secretary of the Interior. 43 U.S.C. §1334(a). This power includes a mandate "to provide for the prevention of waste and conservation of the natural resources of the [OCS], and the protection of

correlative rights therein[.]" Id. Pursuant to this delegation, the Secretary promulgated regulations vesting power to control production rates and well spacing in the Director of the MMS. See supra note 17. As described above, the Director exercises his authority through the issuance of individual OCS Orders targeting specific areas and operations.

This pervasive federal regulatory scheme displaces state law relative to correlative rights on the federal OCS.

Applying Federal Law

The Secretary has defined "correlative rights" as the right of adjacent lessees to be afforded an equal opportunity to explore for, develop, and produce hydrocarbons without waste. 30 C.F.R. §250.2(i). "Waste" is defined as the physical waste of hydrocarbons, the dissipation of reservoir energy, and the

reduction of the amount of ultimately recoverable hydrocarbons. 30 C.F.R. §250.2(qq). Notably, economic lossess [sic] inherent in the cost of drilling wells to exploit a common pool are excluded from this definition.

Federal law embodies the "rule of capture," as tempered by restrictions on waste. To prevail on a correlative rights claim, the plaintiffs need demonstrate waste. This can be accomplished by proving either actual waste by Samedan or the plaintiffs' inability to produce from a common pool without improperly dissipating reservoir energy. To preclude summary judgment, the plaintiffs need raise a genuine issue of material fact concerning this controlling issue. Anderson, 106 S.Ct. at 2510.

The plaintiffs have made no showing that Samedan's operations denied the

state's lessees an equal opportunity to produce hydrocarbons in West Delta Block 18. The plaintiffs' contentions concerning the cost of drilling additional wells to recover a ratable portion of the reservoir are immaterial. The doctrine of correlative rights simply does not incorporate these expenses as "waste." This action is founded solely on proof of intentional or negligent waste of hydrocarbons or reservoir energy.

This Court denied a motion for a preliminary injunction in this case, characterizing the plaintiffs' evidence concerning waste as speculative. The nature of that evidence is unchanged. At issue now is whether the plaintiffs' evidence is sufficient to create a genuine factual issue.

When evidence presented in a motion is subject to conflicting interpretations,

summary judgment is ordinarily improper. See Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 526 (5th Cir.1960). However, the evidence advanced must be substantial. Fireman's Mutual Insurance Co. v. Aponaug Mfg. Co., 149 F.2d 359, 362 (5th Cir.1945); 10A Wright, Miller & Kane, Federal Practice and Procedure §2725 n.31 (1983). A nonmovant is not entitled to hold back his evidence until trial. See Bruce Construction Corp. v. United States for use of Westinghouse Electric Supply Co., 242 F.2d 873, 874-75 (5th Cir.1957). The amount of evidence necessary to raise a genuine issue of fact is enough "to require a jury or judge to resolve the parties' differing versions at trial." First National Bank of Arizona v. Cities Services Co., 391 U.S. 253, 288-89, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

There is absolutely no evidence that Samedan's operations are themselves wasteful. However, the plaintiffs' experts testified that the coordinated exploitation of the allegedly common reservoir _might_ enhance the amount of hydrocarbons ultimately recovered. This ambiguous evidence is hardly substantial, and could not conceivably carry the plaintiffs' burden of proving their case by a preponderance of the evidence.

This Court has weighed a number of factors in evaluating this motion. These factors include the value of additional examination of the plaintiffs' witnesses, and the benefit of further developing a factual issue at trial. Considering the full record and the foregoing legal principles, I find summary judgment to be appropriate on this issue.

IV. THE MOTION TO PERMIT LIMITED DISCLOSURE OF PROTECTED MATERIALS

MGF Oil Corporation and MGF 82 Ltd. (collectively "MGF") are current record interest owners in several state leases in West Delta Block 18. MGF obtained this interest by virtue of a 1982 assignment from Cashco. MGF is not a party to this suit.

In May, 1986 this Court issued a stipulated protective order pursuant to Fed. R.Civ.P. 26(c). The order protects confidential research and commercial information obtained in the discovery process from disclosure. Paragraph 2 of the order details persons entitled to receive confidential information. These include the parties, counsel, and employees and witnesses as necessary to prepare for trial. Paragraph 2(e)

provides for disclosure to "[a]ny person designed [sic] by the Court in the interest of justice, upon the motion of any party and upon such terms as the Court may deem proper[.]" Persons receiving information subject to the protective order are required to execute a written assurance consenting to the Court's *in personam* jurisdiction.

Subsequently, the Louisiana Office of Conservation scheduled a public hearing to develop factual testimony concerning drainage and waste in West Delta Block 18. The State contended that this hearing was necessary to permit the Commissioner of Conservation's technical staff to make formal findings. The defendants expressed concern that a public hearing would result in the unauthorized disclosure of protected information. In compromise, the parties stipulated that a closed hearing

would be conducted, but that any findings would be accorded the same legal effect in this case as if the hearing had been open. The parties agreed that actual notice of the hearing date was to be afforded all parties determined to have an interest. MGF was a signatory to this stipulation.

MGF was notified of the scheduled hearing, and attempted to attend. Samedan objected to the presence of MGF, although both MGF representatives had executed written assurances in compliance with the protective order. To avoid impeding the progress of the hearing MGF withdrew, reserving its right to receive a transcript of the proceeding through the plaintiffs' motion.

This dispute invokes conflicting rights. Nondisclosure of the hearing transcript to MGF might constitute a due

process violation in that MGF may be bound to any legal effect of the proceedings. However, disclosure of protected materials to MGF, a nonlitigant, is outside the scope of the original order.

In their memorandum supporting this motion, the plaintiffs concede that MGF's execution of the stipulation binds them to the terms of the protective order. The order clearly limits MGF's access to confidential information to that permitted by this Court "in the interests of justice." A review of the terms of the order reveals that its unmistakable intent is to prevent disclosures other than those necessary to prepare the case for trial. MGF has no discernible function in the litigation of this claim. Accordingly, MGF should have been aware that it could not qualify to receive disclosure of protected material under Paragraph 2(e) of

the order. Moreover, I find any intrusion on the due process rights of MGF to be minimal. MGF does not seek any input into the Commissioner of Conservation's determination. It simply seeks release of a transcript of the hearing.

The plaintiffs contend that Samedan's acquiescence to the notice of MGF as an interested party constitutes a waiver of the disclosure limitations of the protective order. In the light of the countervailing considerations, I find this argument less than compelling.

JUDGMENT

For the written reasons assigned in the ruling of this date,

IT IS ORDERED that:

1. The motion of defendant Samedan Oil Corp. to strike exhibits is DENIED.

2. The motion for partial summary judgment filed by defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service is GRANTED.

3. The motion for summary judgment filed by defendant Samedan Oil Corp. is GRANTED.

4. The motion of defendants the United States, the Secretary of the Interior, and the Director of the Minerals Management Service to dismiss for lack of subject matter jurisdiction is construed as a motion to dismiss for failure to state a claim, and is hereby GRANTED.

5. The motion of the plaintiffs, the State of Louisiana, Cashco Oil Co., Seneca Resources Corp., and Pelto Oil Co., to permit disclosure of pro-

tected materials to MFG [sic] Corporation is DENIED.

6. All other motions are MOOT.

7. This action is DISMISSED WITH PREJUDICE to all rights of plaintiff and plaintiff-intervenors.

FOOTNOTES

1 These amendments are contained in the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-272, §§8002-8004, 100 Stat. 147-51.

2 "Unitization" refers to the consolidation of separately owned lease interests for the joint exploration or development of a hydrocarbon reservoir under the terms of a unit agreement 30 C.F.R. 250.2(jjj) (1986).

3 For a history of the thirty year dispute surrounding the location of the Louisiana coastline, see United States v. State of Louisiana, 446 U.S. 253, 258-59, 100 S.Ct. 1618, 1622-23, 64 L.Ed.2d 196 (1980), reh. den. 447 U.S. 930, 100 S.Ct. 3007, 65 L.Ed.2d 1110 (1980).

4 The Secretary has delegated the authority to manage oil and gas leasing on the federal offshore continental shelf ("OCS") to the Minerals Management Service ("MMS"). 30 C.F.R. 250.1.

5 It found that the plaintiffs alleged two distinct interests: (1) a right to be protected from income lost through the defendants' drainage of hydrocarbons; and (2) a right to be protected against the waste of hydrocarbons by competitive drilling practices. Finding any drainage losses to be compensable with a money judg-

ment, and allegations of waste to be speculative, it declined to enjoin the defendants' production. See Canal Authorities of the State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir.1974) (among prerequisites for preliminary injunction is substantial threat of irreparable harm and substantial probability of prevailing on the merits).

6 Normally, consideration of a 12(b)(6) motion focuses solely on the allegations in the complaint. However, introduction of matters of public record and entertainment of oral argument is permissible. 5 Wright & Miller, Federal Practice and Procedure, §§1357 n. 41 and 1364, n. 24-43.

7 Paragraph (2) of the amended §8(g) provides: Not withstanding any other provision of this Act, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents and royalties, and other revenues. . . derived from any lease issued after September 18, 1978 of any Federal tract which lies. . . within three nautical miles of the seaward boundary of any coastal state[.] Except as provided in paragraph (5) of this subsection,. . . . the Secretary shall transmit to such coastal State 27 percent of these revenues together with all accrued interest thereon.

8 As amended, §3 of the OCSLA, 43 U.S.C. §1332(4)(B) reads: "(B) the distribution of a portion of the

receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g), will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources. . . ."

9 §8(g)(3), 43 U.S.C. §1337(g)(3), as amended, reads: Whenever the Secretary or the Governor of a coastal State determines that a common potentionally hydro-carbon bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydro-carbon bearing area. If the Secretary has lease or intends to lease such tract or tracts, the Secretary and the Governor of the coastal state may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon bearing area by unitization or other royalty sharing agreement pursuant to existing law. If the Secretary and Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of Paragraph (2).

10 43 U.S.C. §1337(g)(3) reads, in pertinent part: "Whenever the Secretary. . . determines that [a common reservoir] may underlie the Federal and State boundary, the Secretary . . . shall provide. . . notice of the. . . status of the tract. . . ." [emphasis added]

11 "If the Secretary has leased or intends to lease such tract. . . the Secretary. . . may enter into an agreement to divide [production revenues] by unitization or other royalty sharing agreement, pursuant to existing law." [emphasis added] Id.

12 Section 5(a) of the OCSLA, 43 U.S.C. §1334(a) authorizes the Secretary to issue rules "for the prevention of waste and conservation of the natural resources of the [OCS], and the protection of correlative rights[.]" Those correlative rights refer both to the respective rights of federal lessees and the protection of federal royalty interests from state encroachment. See 30 C.F.R. 250.50(a). Section 5(a) was unaffected by the 1986 amendments to the OCSLA.

13 No satisfactory division of 8(g) revenues was ever achieved under the "fair and equitable standard, despite lengthy litigation. At the end of fiscal year 1985, $6.1 billion remained in escrow, awaiting resolution of the claims of seven states. H.R.Rep. No. 300, 99th Cong., 2d

Sess. 547 (1985) U.S.Code Cong. & Admin.News 1986, p. 42.

14 Entitled State of Texas v. Hodel, Nos. 84-2422, 85-9072 (5th Cir. 1985), the appeal was dismissed as moot on May 5, 1986 because of the passage of the 1986 amendments. In the corresponding district court action, Civ. A. No. B-79-476-CA (E.D.Tex.), the Court vacated its previously entered judgment and dismissed the case with prejudice on August 11, 1986 pursuant to the stipulation of the parties.

15 Texas, Louisiana, and Alaska sought judicial resolution of the "fair and equitable" standard. Entitled State of Alaska v. United States, et al., C.A. A-85-502 (D.Ak.1985), the Alaska litigation was dismissed on July 31, 1986 pursuant to the stipulation of the parties.

16 California, Alabama, Mississippi, and Florida were also eligible to receive disbursements under the provisions of §8(g).

17 The MMS implements regulation through formal Orders, issued by the Director, which are directed at specific areas and operations. 30 C.F.R. §250.2(ee). See 30 C.F.R. §§250.10 (jurisdiction of director), §250.16 (authority to set production rate), §250.17 (authority to set well spacing), §250.50 (authority to unitize).

18 5 U.S.C. §551(4) defines "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy[.]" This definition includes nearly every statement an agency may make. Batterton, 648 F.2d at 700.

19 The Court is aware that actual and timely notice of an unpublished policy or regulation will bind a party. Timber Access Industries Co., Inc. v. United States, 553 F.2d 1250, 1255 (Cl.Ct. 1977); Nason v. Kennebec County CETA, 646 F.2d 10, 19 (1st Cir. 1981). However, a review of the record reveals no allegation that Samedan was aware of MMS implementation of the terms of the 1975 memorandum as a policy.

APPENDIX D

TEXT OF STATUTORY PROVISIONS

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43 U.S.C. 1337(g)(2) states:

> (2) Notwithstanding any other provision of this Act, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially until seven years from the date of settlement of any boundary dispute that is the subject of an agreement under section 7 of this Act entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or, (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1)), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the

> percentage of surface acreage of the tract that lies within such three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

43 U.S.C. 1337(g)(3) states:

> (3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary

and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

NUMBER: 87-1317

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

STATE OF LOUISIANA ex rel.
WILLIAM J. GUSTE, JR., ATTORNEY GENERAL,

PETITIONERS

v.

THE UNITED STATES OF AMERICA
THE SECRETARY OF THE INTERIOR
THE DIRECTOR OF THE MINERALS
MANAGEMENT SERVICE; and
SAMEDAN OIL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does Section 8(g)(3) of the Outer Continental Shelf Lands Act, as amended in 1986, require the Secretary of the Interior to enter into unitization or other royalty sharing agreements in order to compensate affected coastal States for their drainage losses?

2. Did Congress intend to provide compensation to affected coastal States for resource drainage by federal lessees on the OCS by the revenue sharing payments made to the affected coastal States under Section 8(g)(2) of the OCSLA?

3. Did Congress provide statutory consequences for a failure of the Secretary of the Interior to enter into a unitization or other royalty sharing agreement with a coastal State under Section 8(g)(3)?

4. Did Congress intend to eliminate litigation over the sharing of OCS revenues under Section 8(g)?

LIST OF PARTIES

The parent company of Samedan Oil Corporation is Noble Affiliates, Inc.

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STATEMENT OF THE CASE

Introduction

By this litigation, the State of Louisiana and its mineral lessees of submerged lands adjacent to Block 18 of the West Delta Area of the Outer Continental Shelf seek to compel the Secretary of the Interior to enter into a unitization agreement under Section 8(g)(3) of the Outer Continental Shelf Lands Act ("OCSLA"). Essentially, the State of Louisiana and its mineral lessees object to the lawful operation of the rule of capture insofar as it may benefit the Federal government and its mineral lessees operating on Block 18 of the West Delta Area within the domain of the United States on the Outer Continental Shelf. Thus, to eliminate their alleged drainage losses, these petitioners hope to convince this Honorable Court that the Secretary of the Interior has a statutory duty to enter into unitization agreements with the State whenever and as soon as it is determined that a common reservoir may underlie both the state and federal domains. No such duty exists, nor was production sharing through forced unitization with the coastal States the intended Congressional remedy for drainage of mineral resources from state lands by federal operations on the Outer Continental Shelf.

Through Section 8(g) of the OCSLA, Congress expressed its policy regarding the coastal States' remedy for resource drainage by federal lessees on the OCS - that remedy being limited to participation by the coastal States in revenues generated by federal leases within the 8(g) zone. With careful regard for and proper observance of the principles of statutory construction laid down by this Court and with due consideration to the legislative history affecting not only the 1986 amendments to the OCSLA but also the original 8(g) revenue sharing plan implemented by Congress in 1978 to address the drainage issue, the United States District Court for the

Western District of Louisiana[1] and the United ~~States~~ Court of Appeals for the Fifth Circuit[2] have rejected petitioners' suggestion of an alleged "duty to unitize" under the 1986 amendments of the OCSLA.

Respondent submits that an examination of the statutory analysis performed by the Fifth Circuit Court of Appeals will readily disclose that no analytical conflict exists between the Fifth Circuit and the First and Tenth Circuits as suggested by the petitioners herein. Moreover, the decisions of the lower courts do nothing to disturb the historical practice of unitization between the sovereigns along the federal-state boundary of the Outer Continental Shelf. Respondent accordingly submits that the decision of the Fifth Circuit Court of Appeals in this matter is correct and does not raise questions that merit review by this Honorable Court.

HISTORY OF THE CASE

For purposes of this opposition brief, respondent adopts by reference the statement of facts contained in the decisions of the courts below.

In connection therewith, it is appropriate to observe that following the institution of this litigation, the Department of the Interior (acting through the Minerals Management Service) concluded a fact-finding process to determine whether the reservoirs involved in this litigation are common and competitive and on May 1, 1987 issued its final determination, concluding that two of the three reservoirs described in Louisiana's complaint are non-competitive with the reservoirs encountered in the Samedan OCS wells and that the remaining reservoir produced by the state lessees was competitive

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1 The opinion of the District Court is reported at 656 F. Supp. 1310 (W.D. La. 1986).

2 The opinion of the Fifth Circuit is reported at 832 F. 2d 935 (5th Cir. 1987).

with the reservoir produced by Samedan from its federal lease. The Department of the Interior also concluded that no unnecessary drilling or waste of oil and gas had occurred, or would occur, as a result of operations conducted by Samedan and further determined that unitization of the subject reservoirs was not necessary for the conservation of the natural resources of the OCS. The District Court in this litigation also found absolutely no evidence that Samedan's operations are themselves wasteful, a finding affirmed by the Fifth Circuit Court of Appeals which stated:

> "Assuming that Louisiana or the state lessees would have a cause of action against the Director or Samedan because of waste, this record raises no issue to support such a claim. The closest Louisiana got to this issue was expert testimony given during the hearing on the state's motion for a preliminary injunction that coordinated exploration might enhance the amount of hydrocarbons ultimately recovered. Against that suggestion was detailed proof by Samedan of prudent operations in accord with federal regulations and under substantial oversight by the MMS. We find no evidence of waste in the record and affirm the summary judgment."

ARGUMENT

Prior to analyzing the contentions of error in the decisions of the lower courts suggested by petitioners, a brief examination of the Congressional goals underlying enactment of the OCSLA and the incorporation of the drainage compensation remedy under Section 8(g) is appropriate.

Congressional Goals Underlying Enactment of the OCSLA and its Amendments

The Outer Continental Shelf Lands Act of 1953 amended the Submerged Lands Act in order that the area of the Outer Continental Shelf beyond the boundaries of the states could be leased and developed by the federal government. The Act was a legislative confirmation of the jurisdiction of the United States over the natural resources of the subsoil and sea bed of the Outer Continental Shelf

outside state boundaries and made federal law applicable to that area. Under the OCSLA, the Secretary of the Interior has exclusive conservation jurisdiction over federal lands of the Outer Continental Shelf and has declared that OCS orders implementing his conservation jurisdiction over lease operations of every kind, including rates of production, on federal oil and gas leases on such lands comprise the exclusive rules and procedures governing the development of such leases.[3] Accordingly, conservation regulations of the State of Louisiana have no application to federal OCS development.[4]

By the early 1970's, public awareness of the environmental hazards associated with OCS development and the Arab Oil Embargo of 1973 underscored the need for restructuring the statutory and regulatory framework affecting OCS leasing to both foster expedited development and provide greater protection against environmental hazards.

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3 See the December 4, 1970 notice by the Secretary of the Interior published in the Federal Register on December 5, 1970, appearing at 35 Fed. Reg. 18559

4 See also *Kirkpatrick Oil & Gas Company v. United States*, 675 F. 2d 1122 (10th Cir. 1982) which affirmed that no state-ordered force pooling can bind the federal government without the consent of the Secretary of the Interior. Noted the Court: "If compulsory state pooling orders were applied to federally owned lands over the Secretary's objection, a State could impose acreage requirements and unit boundaries that conflict with the Secretary's judgment of the best standards for conservation purposes." (Emphasis ours) A contrary result, noted the Court, would interfere with the Secretary's control over its own lessees and lease provisions requiring, for example, the lessee to drill in different production zones or to produce at particular rates.

Thus, one of the primary Congressional purposes for the 1978 amendments to the OCSLA, including the incorporation of Section 8(g), was the establishment of "policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade." See 43 U.S.C. § 1332 and 1802. Accord: *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 102 S.Ct. 205 at 209 n.2, 70 L.Ed.2d 309 (1981). Another objective was to abate federal-state dissonance arising out of the adverse environmental and economic impacts of OCS development on the coastal States, which had commonly resorted to litigation as a means for delaying OCS development.[5]

In Section 8(g), Congress specifically addressed the problems associated with the existence of a common border separating federal and state offshore property, including particularly the problem of drainage.

As enacted in 1978, Section 8(g) created a zone comprising an area of federal offshore lands lying within three miles of the seaward boundaries of the coastal States. Within this zone the Secretary of the Department of the Interior, in consultation with the Governor of the affected coastal State, would determine at the time the Secretary solicits nominations for lease bids on tracts within this zone, whether the area may contain one or more oil or gas pools or fields underlying both the Outer Continental Shelf and lands subject to the jurisdiction of the state. If such tracts were identified, the Secretary was required to offer the Governor of the coastal State the opportunity "to enter into an agreement concerning the disposition of revenues which

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5 For a good summary of the history and experience on federal development of the Outer continental Shelf, see *State of Texas v. Secretary of the Interior*, 580 F. Supp. 1197 (E.D. Tx. 1984).

which may be generated by a federal lease within such area in order to permit their fair and equitable division between the State and Federal Government." See former 43 U.S.C. § 1337 (g)(2). If the parties could not agree regarding the disposition of revenues from such lease, the Secretary could nonetheless proceed with the leasing; however, under Section 1337 (g)(4), he was required to deposit into a separate account all bonuses, royalties and other revenues attributable to oil and gas pools underlying both the Outer Continental Shelf and submerged lands subject to the jurisdiction of the coastal State until such time as an agreement was reached or, failing same, as a district court of the United States determined the fair and equitable disposition of such revenues, as well as any accrued interest, and the proper rate of payments to be deposited into the treasuries of the Federal Government and such coastal State.

Under the clear and unambiguous language of the statute, compensation to the affected coastal State for drainage was limited to a fair and equitable division of the revenues generated by the federal lease(s) affecting the common reservoir. Moreover, the State gained the advantage of such compensation by the mere identification of a potential common pool or field, even though there was no definitive determination that such common geological structure existed. Had Congress intended to resolve the drainage problem by requiring a sharing/allocation of production by unitization or by restricting production allowables between the competing state and federal tracts, it could easily have done so by an express textual requirement. But Congress made no such requirement.

One obvious reason for excluding such requirement was to preserve to the Secretary the discretion and flexibility necessary to accomplish an expeditious and orderly development of the federal resources under the Outer Continental Shelf, utilizing unitization only

when he deemed it appropriate for proper development of the leases.[6] In this regard it is also to be observed that under the federal regulations, even as between competing federal lessees on the Outer Continental Shelf, unitization (whether voluntary or compulsory) may not be required or approved by the Director of the MMS until he finds that the delineation of any reservoir or any potential hydrocarbon accumulation has been reasonably established. See 30 C.F.R. § 250.50(c).

Moreover, a provision mandating the confection of a unitization agreement between the state and federal authorities to resolve the drainage problem would unquestionably frustrate the statutory goal of promoting expedited exploration and development of the Outer Continental Shelf to achieve national economic and energy objectives by allowing an affected coastal State the opportunity, by merely withholding cooperation, to delay or prevent the exploration and development of federal tracts in the 8(g) zone. Further frustration of Congressional purpose would result from the probability that, in the absence of agreement between the state and federal authorities over reservoir limits, control over production allowables on wells producing in the competitive reservoir, etc., the State would pursue oft-resorted to litigation (and the delays inherent therein) to require the federal courts to function as a superior or ultimate regulatory authority and weigh the myriad geological, engineering and other technical data in order to force-unitize such reservoirs so as to comply with such a statutory requirement.

6 Compare *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 102 S.Ct. 205 at 213 70 L.Ed. 2d 309 (1981): "If Congress meant to restrain the Secretary of the Interior's discretion in experimenting with the various alternative bidding systems, we can expect the statute to reflect that intent. But it does not...Most significantly Congress left 'to the discretion of the Secretary.' § 1337 (a) (1), the cnoice among the various nontraditional alternatives, evidently leaving to his expert administrative determination the complex, technical problem of deciding which alternative bidding systems are more likely to further the statute's objectives."

Such considerations prompted Congressional rejection of early versions of the 1978 OCSLA amendments which included a joint leasing system that required joint federal-state leasing of tracts located within the 8(g) zone.[7]

Through Section 8(g), Congress specifically declared its policy regarding the remedy to affected coastal States for drainage of mineral resources from state lands by federal lessees on the Outer Continental Shelf. That remedy is limited to a participation by the affected coastal State in the federal lease revenues derived from federal OCS tracts within the 8(g) zone affected by a potentially common reservoir. Such revenue sharing was intended to compensate these states not only for the effects of drainage but also for related inequities fostered by the juxtaposition of ownership interests at the state-federal border.

In *State of Texas vs. Secretary of the Interior, et al*, 580 F.Supp. 1197 (E.D. Tx. 1984), the United States District Court for the Eastern District of Texas stated that in determining the "fair and equitable" division of the federal lease revenues required by Section 8(g) as enacted in 1978, a court should examine and weigh the totality of the circumstances, with the proper division of revenue based not simply upon a consideration of the proportionate surface area of the reservoir underlying the federal-state domains, but also upon consideration of the economic benefits accruing to the federal government as a result of information generated by prior activity on the state side of the border and development incentives benefiting the federal government as a result of royalty rate disparity between federal and state leases affecting the potential common reservoir, among other factors. Several important conclusions by the court regarding the scope and purpose of Section 8(g) should be noted:

(1) The court observed that a consideration of the purposes of Section 8(g)(4) (as enacted in 1978) leads to the conclusion

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7 See in this regard, H.R. Rep. No. 590, 95th Congress, 2d Sess. 219, 220 (1978) reprinted in 1978 U.S. Code Cong. & Adm. News at 1625.

that a suit for a fair and equitable division of 8(g) lease revenue is an exclusive remedy, a result which the court notes is "consistent with the Congressional purpose of alleviating litigation - related delay of OCS development". See 580 F. Supp. 1197 at 1207, note 46.

(2) The court recognized as a specific limitation on the standard by which a "fair and equitable" disposition is based, the statutory limitation that only lease revenue attributable to tracts located in the 8 (g) zone are subject to division. Id. at Page 1219, note 86.

(3) The court aptly observed:

"As the Supreme Court has noted, courts perform their constitutional duty by "construing the language Congress has employed. In so doing, ...[courts must] take statutes as ...they find them, guided, if ambiguity appears, by the legislative history and statutory purpose." *Diamond v. Chakrabarty*, 447 U.S. 303, 315, 100 S.Ct. 2204, 2211, 65 L.Ed.2d 144 (1980)." Id. at Page 1218.

Disputes between the Secretary and the Governors of coastal States over the scope of the revenue entitlement under Section 8(g) and the proper allocation of these revenues resulted in failure to effect the revenue sharing agreements required by the statute, the escrow of substantial sums in 8(g) revenues to be divided between the sovereigns and, of course, litigation to accomplish the proper revenue division. In 1986 Congress amended the OCSLA to permanently resolve the disputes over OCS revenues and to release the impounded funds.

The 1986 amendments to Section 8(g) of the Outer Continental Shelf Lands Act were adopted under the Consolidated Omnibus Budget Reconciliation Act of 1985. The amendments contain a funding provision at Section (8)(g)(2) which commits to affected coastal States and their local governments revenues for use in mitigating the adverse economic and environmental effects of development of the mineral resources of the Outer Continental Shelf adjacent to state lands. Under the amendment, 27% of the bonuses, rents, royalties and other revenues derived from federal leases issued after September 18, 1978 covering any federal tract situated within

the 8(g) zone (including tracts containing common potentially hydrocarbon-bearing areas as to which drainage might occur) is to be paid by the Secretary to such coastal State. The amendment thus perpetuated the former Congressional policy regarding compensation to these states for drainage of state resources by federal lessees operating on the Outer Continental Shelf.

Despite the permissive language of Section 8(g)(3) of the 1986 amendments, petitioners suggest that this section mandates the Secretary to enter into a unitization or other royalty sharing agreement to protect the State from drainage losses. More specifically, they argue that Congress has codified the "historical practice" of unitization in such situations. Briefly consider what petitioners have referred to in this litigation as "the historical arrangements that have served so well to protect both sovereigns against the inequitable effects of drainage."[8]

The Historical Practice of Unitization

According to the district court testimony of Bobby Jones, the former chief geologist for the Louisiana State Mineral Board and acting Assistant Secretary who, according to petitioners, "is intimately acquainted with State-Federal unitization agreements," this historical arrangement has been <u>wholly voluntary unitization</u> between the sovereigns and their lessees (in the majority of the cases there existing only a common lessee between the sovereigns), failing which the sovereigns pursued offset drilling or other means to protect their interests from drainage.[9] Moreover, Mr. Jones indicated that the normal practice has been to consider unitization only when a well has been completed on both sides of the federal-state boundary and was producing from the same reservoir.[10] Voluntary unitization, of course, requires the complete accord of all parties regarding the

8 Vol. 4, Record at page 692.

9 Vol. 11, Record at 110-112 and 153-156.

10 Vol. 11, Record at pages 136-137.

productive limits of the common reservoir, the appropriate sharing formula, the proper and efficient rates of production from unitized wells and the designation of a unit operator, among other considerations. The authority of the Secretary of the Interior to enter into such voluntary unitization agreements did not proceed from any statutory mandate to employ unitization at all times and in all cases as the means of countering the effects of drainage across the state-federal OCS border nor did it proceed from any Congressional intent or expectation that he always agree to unitize in such circumstances. Had such been the Congressional intent or statutory duty, then it would have been illogical for Congress in 1978 to fashion the Section 8(g) revenue sharing remedy to the coastal States designed primarily to alleviate the economic effects of drainage of mineral resources underlying State submerged lands by federal wells on the Outer Continental Shelf.

Historically, as now, unitization efforts by the Secretary affecting common pools across the federal-state OCS border are appropriate only when necessary for the prevention of waste and the conservation of the natural resources of the federal domain of the Outer Continental Shelf.[11] Thus the Preamble to 30 CFR 250.50, 250.51 and 250.52, Unitization; and Pooling, and Drilling Agreements,[12] which addresses the final rule of the Department of the Interior incorporating the modifications to Sections 250.50, 250.51, and 250.52 of Chapter II of Title 30 of the Code of Federal Regulations required to implement the Department of the Interior's responsiblity to assure prompt and efficient exploration and development of leased areas and to issue regulations "for unitization, pooling and drilling agreements (43 USC 1334)" provides:

> Subsection 250.50(a) sets forth the basic authorization for unitization, which is the conservation of the natural resources of

11 See Section 5 of the OCSLA at 43 U.S.C. § 1334.

12 See Preamble to 30 C.F.R. § 250.50, 250.51 and 250.52 at 45 Fed. Reg. 29280 (1980), hereinafter cited as "Preamble".

the OCS. ...Under § 250.51-2(b), compulsory unitization, like voluntary unitization, must conform to the criteria of § 250.50. (Emphasis added)

30 CFR § 250.50 provides in pertinent part:

(a) Unitization may be required or approved by the Director for the prevention of waste and the conservation of the natural resources of the OCS, and for the protection of correlative rights therein, including the protection of Federal royalty interests. (Emphasis ours)

* * *

(c) Unitization may not be required or approved by the Director until he finds that the delineation of any reservoir or any potential hydrocarbon accumulation has been reasonably established.[13]

Furthermore, that the OCSLA and unitization regulations of the Code of Federal Regulations do not embrace the notion of any mandatory duty in the Secretary to unitize common reservoirs across the federal-state OCS boundary is particularly reflected in the following statement in the aforementioned Preamble:

Provide for Unitized Operation of Less than an Entire Reservoir. One respondent recommended that the proposed rule be clarified to permit unitized operation of a portion of a reservoir. Generally, unitization should encompass an entire reservoir, or for exploration purposes, a geological structure expected to evidence the possible presence of a potential hydrocarbon accumulation. However, there may be unusual situations, for example, near a Federal/State boundary, near a marine sanctuary, or near some natural feature where unitization of a portion of a reservoir or potential hydrocarbon accummulation would be appropriate. Accordingly, this suggestion has been adopted.

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13 Since the pursuit of a revenue sharing agreement under Section 8(g)(3) is possible upon simple identification of a common potentially hydrocarbon bearing area underlying the federal-state boundary even though definitive reservoir limits are not yet reasonably determinable, unitization would never be an appropriate mechanism to accomplish the purposes of Section 8(g)(3) in most instances when geophysical or early drilling data permit identification of potential common areas.

> However, it should be noted that it is not the Department's intent to authorize or to require that an area be developed and produced under a unit agreement when the objectives that would be obtained through unitization are being or can be obtained without a unit agreement. (Emphasis added)

Aware of the historical arrangement permitting the possibility for voluntary unitization to eliminate the adverse effects of drainage across the federal-state OCS border, Congress in 1978 fashioned in Section 8(g) a remedy to the coastal States for the adverse effects of drainage which was completely devoid of any reference to or preference for unitization, whether voluntary or compulsory, as the means of protecting the states' interests. As previously indicated, the clear Congressional purpose behind the Section 8(g) remedy in the 1978 amendments to the OCSLA was to eliminate any opportunity for delay in OCS leasing which could result from any requirement for joint federal-state action and which would impair the primary objective of expedited exploration and development of the federal Outer Continental Shelf. Thus the scheme for joint leasing by state and federal authorities of tracts within the 8(g) zone affecting a potential common pool was eliminated. Requiring a unitization agreement by both sovereigns (and their mineral lessees) as a prerequisite to the development and production of federal OCS tracts within the 8(g) zone affected by a common pool would obviously violate the same Congressional purpose. In fact, that Congress never intended unitization to be the mandated remedy to the drainage problem along the federal-state OCS border under the 1986 amendments is apparent from the Congressional rejection of the Alaska forced unitization proposal.[14]

It should also be observed that the suggested "duty to unitize" would not only frustrate Congressional purposes but would create an impractical, unworkable approach to the drainage problem. A "duty

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14 See footnote 15 of the opinion of the Fifth Circuit in this litigation at 832 F. 2d 935 at 942.

to unitize" suggests by implication that all parties must somehow agree on all matters affecting the unitized operation which, as demonstrated by the significant differences in geological and engineering opinion embraced by the parties in this litigation, will not always occur.[15] Since Congress has created no superior regulatory agency or other authority to resolve such inter-sovereign disputes, the approach suggested by petitioners would throw upon the federal courts the burden of resolving these technical disputes and other differences of opinion on the unitized operation without the benefit of any assistance by a staff of technical advisors (as is utilized by the MMS and by the Commissioner of Conservation of the State of Louisiana in the resolution of such problems), a burden clearly beyond the proper functioning of the federal judiciary and obviously outside the Congressional purposes of the OCSLA. Moreover, the obvious and consequential need for resort to the courts to resolve differences of opinion on unitization and the unitized operation of federal OCS lands affected by potential common reservoirs with the State of Louisiana is unquestionably contrary to the clear Congressional purpose behind the 1978 amendments to the OCSLA of avoiding litigation-related delays in the development of federal resources of the Outer Continental Shelf.

Thus, the historical and present role of unitization along the federal-state border of the OCS reflects the practical wisdom of Congress--that unless necessary for the prevention of waste or conservation of the natural resources underlying the federal domain of the outer Continental Shelf, unitization across the federal-state

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15 A unitization agreement will normally fix reservoir limits, define the unitized horizons, allocate production and costs to the various unitized tracts, designate the unit operator, establish rates of production between wells, provide for expansion or reduction of the unit area as may be required and for a recomputation of equities in the event new data recovered in subsequent drilling dictates a change in unit configuration, provide for an operating agreement to regulate the rights of the parties on subsequent unit operations, among other terms.

OCS border for the exclusive purpose of offsetting possible drainage from state submerged lands is only appropriate when the sovereigns and their respective lessees can voluntarily agree on all matters affecting the unitized operation, failing which each sovereign remains free to protect against the effects of drainage by drilling or other means, and the affected coastal State remains protected against the adverse economic effects of drainage by its revenue sharing entitlement under Section 8(g) of the OCSLA.

We now address the specific issues which petitioners have raised for review by this Court.

The Alleged "Duty" Under Section 8(g)(3)

Section 8(g)(3) of the 1986 amendments provides that the Secretary or the Governor of a coastal State shall notify the other if either determines that a common potentially hydrocarbon-bearing area may underlie the federal and state boundary and that the Secretary shall provide to the Governor notice of the current and projected status of the tracts in the area. It additionally provides that if the Secretary has leased or intends to lease the area, the Secretary and the Governor may enter into an agreement to divide the revenues from production from the common potentially hydrocarbon-bearing area, pursuant to existing law. If no agreement is reached, the Secretary may proceed with the leasing of the area. If an agreement is reached, the revenue received by the Federal government is subject to the 27%-73% division set forth in Section 8(g)(2).

Unlike the original 8(g) legislation adopted in 1978 which required (by use of the word "shall") the Secretary to offer the Governor of the affected coastal State the opportunity to enter into a revenue sharing agreement as to tracts within the 8(g) zone affected by a potential common pool, under the 1986 amendments, Congress left the decision of whether or not to enter into a revenue sharing agreement under Section 8(g)(3) to the unfettered discretion of the Secretary. Note that the statutory language does not create an obligation to enter into an agreement and then authorize the Secretary

to use his discretion in deciding the type and form of agreement to be used. Rather the statute is clearly permissive as to the very act of entering into such an agreement.

Petitioners allege that by ruling that "may" was purely permissive as used in this statute, both the Fifth Circuit and the District Court evaded a thorough examination of the statutory context and legislative history of Section 8(g)(3), permitting a result which defies the Congressional will. Petitioners further suggest that the lower courts violated the canons of statutory construction that legal effect must be given to all parts of a statute and that a statute must be interpreted to avoid absurd results. Review of the lower court decisions demonstrates these contentions to be wholly unfounded.

In finding that the Secretary of the Interior has no duty under Section 8(g)(3) to enter into a unitization or royalty sharing agreement to compensate states for drainage losses, the District Court gave careful scrutiny to the canons of statutory interpretation in its analysis, noting that its starting point is the plain meaning of the statutory language. Although observing that if necessary, recourse to legislative history is appropriate, the Court's consideration of the legislative commentary was with appropriate deference to the significance of the statutory language. Commented the Court:

> "Undoubtedly, the passage of the 1986 OCSLA amendments was engendered by different, and perhaps inconsistent, legislative motives. That history does not give the court license to impose its own policy choice. While we are not confined to the statutory language, we are confined by it, and a presumption exists that the legislature intended the plain meaning of its words. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 543-44 (1947)."

The Court thus observed:

> "The plaintiffs' position ignores the permissive nature of the revenue sharing authority established in § 8(g)(3). Although the notification requirements of § 8(g)(3) are cast in mandatory language, the text preceding the revenue sharing provision is clearly permissive. This language invests the Secretary with discretion to enter into agreements pursuant to § 8(g)(3). See

generally *Knight Newspapers, Inc v. United States*, 395 F. 2d 353, 357-58 (6th Cir. 1968)."

Moreover, the District Court found that characterization of Section 8(g)(3) revenue sharing agreements as discretionary is consistent with the section's restriction of agreements to those formed "pursuant to existing law". Stated the court:

> "Existing law permits the Secretary to enter into unitization agreements to protect federal royalty interests and prevent waste of natural resources. It is not unreasonable to interpret § 8(g)(3) as preserving the Secretary's license to enter into voluntary agreements with the states. The Secretary would have discretion to negotiate such an agreement when advantageous to federal interests."

This conclusion was also confirmed by analysis of the overall structure of the 1986 amendments and their legislative history and by comparison to the structure of pre-amendment Section 8(g). Observed the District Court:

> "Moreover, a comparison to pre-amendment § 8(g) gives credance to the view that drainage compensation is incorporated in § 8(g)(2)scheme. The former version of § 8(g), enacted in 1978, provided that the existence of a common reservoir triggered a duty 'to enter into an agreement concerning the disposition of revenues which may be generated by a Federal lease within such area in order to permit their fair and equitable division between the state and federal government.' 43 U.S.C. § 1337(g)(2), amended by § 8002-8004 of the Consolidated Omnibus Budget Reconciliation Act, Pub. L. 99-272, 100 Stat. 147, 148 (1986) [hereinafter, 'former { 8(g)']. If the parties could not agree on a 'fair and equitable' division, the Secretary was empowered to proceed with leasing. However, former § 8(g)(4) required that all revenues be retained in a separate account until agreement was reached or the issue resolved by a U.S. District Court.
>
> Because the 1986 amendments preserved the Secretary's express authority to proceed with leasing in the absence of any agreement, the failure to carry the escrow provision over into the current § 8(g)(3) indicates that agreement on revenue sharing is now entirely discretionary. This is consistent with the view that the substitution of the 27%-73% split now mandated in §

8(g)(2) for the 'fair and equitable' standard was designed to incorporate drainage compensation.

One of the stated policies of the OCSLA is to make the OCS available 'for expeditious and orderly development.' 43 U.S.C. § 1332(3). The legislative history of the 1986 amendments indicates that a major goal of Congress was to avoid protracted litigation over the meaning of 'fair and equitable.' This purpose is inconsistent with plaintiffs' position concerning the meaning of § 8(g)(3). Congressional substitution of the 27%-73% division for the 'fair and equitable' standard could not be perceived to avoid litigation if drainage was to be compensated separately.

I recognize that my analysis is predicated on the understanding that the 'fair and equitable' standard incorporated drainage losses. Despite plaintiffs' contrary position, I am confident that the history and interpretation of the OCSLA confirm that reliance. The legislative history of the 1978 OCSLA amendments clearly indicates that former § 8(g) was intended to address drainage concerns."

The Court continued:

"Presumably, the terms of any voluntary § 8(g)(3) revenue sharing across the State/Federal boundary would compensate for drainage losses. Because I interpret the division mandated by § 8(g)(2) to incorporate drainage compensation, it might appear that voluntary § 8(g)(3) revenue sharing affords the states a double recovery.

However, drainage is only a single element of § 8(g) compensation. See *State of Texas*, 580 F.Supp. at 1221. It is entirely plausible that Congress simply believed that factoring out drainage from the 27% figure posed too much of an obstacle to the operation of a voluntary revenue sharing scheme."

In affirming the decision of the District Court, the Fifth Circuit Court of Appeals stated:

"The plain meaning and legislative history of section 8(g)(3) also do not support Louisiana's contention that the Secretary is compelled to enter a revenue sharing agreement. While the notification requirements of section 8(g)(3) are cast in mandatory language, the revenue sharing provision is clearly permissive. This language invests the Secretary with discretion to enter into agreements but does not require him to do so. The legislative history supports this interpretation."

Regarding the legislative history, the Fifth Circuit noted particularly the fact that during development of the new Section 8(g)(3), the House Interior and Insular Affairs Committee received a proposal from the State of Alaska which would have expressly enabled states to compel the Secretary to unitize common reservoirs; however, no Representative or Senator offered this draft as a bill or amendment to a bill.

Moreover, the Fifth Circuit found that Louisiana's construction of Section 8(g) was not supported by the Congressional purpose which animated the 1986 amendments, recognizing that the 1986 amendments were intended to permanently settle disputes over OCS revenues. The Fifth Circuit stated:

> "Congressional desire to eliminate litigation over OCS revenues is clearly reflected by the allocation to the states of 27 percent of all mineral revenues from federal lands, and by the abolition of the provisions requiring the negotiation of revenue sharing agreements and equitable dispositions by court decree of disputed revenues held in treasury escrow accounts. Louisiana's construction of section 8(g)(3) would emasculate this clear congressional policy by engaging the courts in further litigation over revenue sharing and the determination of whether the Secretary has negotiated unitization agreements in good faith."

It is a fundamental principle of law that in construing the meaning of a statute, a court must begin with the language of that statute. See *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed. 2d 82 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S. Ct. 1917, 1935, 44 L. Ed. 2d 539 (1975). Absent ambiguous language or a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). Moreover, an interpretation that leads to absurd results which would thwart Congressional purposes is to be avoided. See Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643, 98 S. Ct. 2053, 2061, 56 L. Ed. 2d 591 (1978). When a literal reading of a statute is consistent with its

Congressional purposes, no need to depart from the text exists. See *Barbee v. United States*, 392 F. 2d 532, 535 n. 4 (5th Cir. 1968), *cert. denied* 391 U.S. 935, 885 S. Ct. 1849, 20 L. Ed. 2d 855 (1968); *United States v. Campos-Serrano*, 404 U.S. 293, 298, 92 S.Ct. 471, 474-475, 30 L.Ed.2d 457 (1971). If the language of the statute is sufficiently clear in its context, it controls. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200-201, 214, 96 S.Ct. 1375, 1384-1385, 1391, 47 L.Ed.2d 668 (1976).

The decisions of the lower courts herein not only demonstrate careful analysis of the statutory context and legislative history of Section 8(g)(3), but also demonstrate faithful adherence to the foregoing canons of statutory interpretation recognized and/or affirmed by this Honorable Court.

Finally, the suggested conflict between the Fifth Circuit analysis in this litigation and the statutory analysis performed by the First Circuit Court of Appeals in *Commonwealth of Massachusetts v. Andrus*[16] and by the Tenth Circuit Court of Appeals in *Nevada Power Company v. Watt*[17] is non-existent. In *Andrus* the First Circuit interpreted the word "may" in Section 5(a)(1) of the OCSLA (prior to the 1978 amendments) as implying an underlying duty in the Secretary to exercise due diligence to exercise his regulatory authority under the act so as to avoid unreasonable risks to the fisheries in waters over the Outer Continental Shelf. In *Watt*, the Tenth Circuit interpreted the word "may" in Section 304(b) of the Federal Land Policy and Management Act as requiring consideration of the specified reasonableness factors in assessing reimbursement costs pertinent to applications for rights-of-way relating to public lands.

No conflict of statutory analysis is either apparent or inferred from the cited decisions. In both *Andrus* and *Watt*, the Circuit Courts of Appeal found in the legislative history support for their

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16 594 F. 2d 872 (1st Cir. 1979).

17 711 F. 2d 913 (10th Cir. 1983).

interpretation of the statutory language as excluding discretion. In the instant litigation both the District Court and the Fifth Circuit considered the legislative history and found that it did not support petitioners' contention that the Congressional use of "may" in Section 8(g)(3) imposes an affirmative duty upon the Secretary of the Interior to enter into a revenue sharing agreement with the affected coastal States. Moreover, both the District Court and the Fifth Circuit were able to glean Congressional intent from historical analysis of the pre-amendment structure of the statute in question, comparing the structure of Section 8(g)(3) as enacted in 1986 to the structure of the original 8(g) compensation scheme enacted under the 1978 amendments. While Congress expressly mandated both identification of potentially common areas and action by the Secretary to confect a revenue sharing agreement under the 1978 legislation, only notice of a common potentially hydrocarbon-bearing area and of the status of the federal tracts within the area was mandated under the 1986 legislation.

Indeed, the discretionary authority of the Secretary to effect revenue sharing agreements under the lower courts' construction of Section 8(g)(3) is consistent with the discretionary authority of the Secretary to exercise other powers vested in him under the OCSLA and/or Mineral Lands Leasing Act. See, for example, *Udall v. Tallman*, 380 U.S. 1, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965), cited by the First Circuit in *Andrus; Burglin v. Morton*, 527 F. 2d 486 (9th Cir. 1975), *cert. denied*, 425 U.S. 973, 96 S. Ct. 2171, 48 L. Ed. 2d 796 (1976); and *Watt v. Energy Action Educational Foundation*, supra; compare also *Ferry v. Udall*, 336 F. 2d 706 (9th Circ. 1964), *cert. denied* 381 U.S. 904, 85 S. Ct. 1449, 14 L. Ed. 2d 286 (1965). Moreover, a Congressional policy supporting the use of unitization to offset the effects of drainage across the federal-state OCS boundary would fly squarely in the face of the Congressional policy with regard to onshore federal lands evidenced in the Mineral Lands Leasing Act of 1920. At 30 U.S.C. § 226(g), a provision wholly

separate and distinct from the unitization authority of the Secretary at subpart (j) of this Act, Congress provided:

> "Whenever it appears to the Secretary that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he may negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage. Such agreements shall be made with the consent of the lessees, if any, affected thereby." (Emphasis ours)

Of even greater significance, the unitization authority vested in the Secretary with respect to federal onshore lands under 30 U.S.C. § 226 (j) parallels the discretion left in the Secretary under the OCSLA with respect to federal OCS lands in that it delegates to the Secretary's discretion the power to approve, in order to promote conservation, unitization of federal lands and mineral leases. Note again, in this regard, the decision of the Tenth Circuit Court of Appeals in *Kirkpatrick Oil & Gas Co. v. United States*, supra.

Finally, if the permissive "may" within Section 8(g)(3) does not exclude an affirmative duty in the Secretary of the Interior to enter into revenue sharing agreements with the affected coastal Sates to offset drainage losses, then we must consider what meaning Congress intended to impart by its use of the permissive may in this statute.

One possibility suggested by petitioners is that the discretionary "may" refers only to the selection of the form of agreement to be used to accomplish the duty to protect the State resources from drainage. If this were so, then we must consider, as did the District Court below: If Congress had simply replaced "may" with "shall" there would exist the same grammatical import as to the choice between the kind of agreement but no suggestion of discretion in the Secretary to act. Why then did Congress not substitute the words if it intended to compel an agreement?

Another possibility suggested by petitioners in the courts below is that the discretionary "may" reflects Congressional uncertainty over its ability to compel the Governor of a coastal State to execute an agreement but does not supplant the alleged statutory obligation of

the Secretary to protect the State from drainage by entry into some form of agreement. In fact, petitioners have stated in brief in the lower court:

> "One may argue whether Congress can or has imposed a binding duty on the Governor of a sovereign state but it can clearly do so as to its own sovereign's executive officers."[18] (Emphasis added)

Recall too that the form of agreement which petitioners suggest Congress intends and expects based upon "historical arrangements" is an agreement unitizing the reservoirs. Any suspicion by Congress regarding its ability to compel the coastal States to join in unitization agreements would indeed be warranted. Louisiana Governor David C. Treen declared in 1983, in response to the unitization proposal of the MMS in this area prior to the federal lease sale, that "Louisiana has no legal authority to force its lessees to unitize across the state-federal boundary as you suggest." At the hearing on the preliminary injunction in the district court below, Bobby Jones, the State's authority on state-federal unitization agreements on the OCS, declared in response to an inquiry as to his knowledge of any unit between the two sovereigns in the 8(g) area that any governmental agency,either state or federal, has ever forced either party into:

> "That's voluntary unitization, no force pool. Nobody has authority to force pool out there."[19]

Given the Congressional rejection of a forced unitization proposal in 1986 and a joint leasing proposal in 1978 and against the backdrop of a legislative history clearly reflecting Congressional disfavor with any approach to the drainage issue that would impede federal offshore development or create the opportunity for litigation-related delay in that development, it is patently absurd to suggest that Congress intended [contrary to the clear and specific language of Section 8(g)(3)] to require the Secretary of the Interior as a statutory

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18 Original Brief of Appellants in the United States Court of Appeals for the Fifth Circuit at page 33.

19 Volume 11, Record at page 153.

duty to agree to unitize all common reservoirs with the affected coastal States aware of its inability to compel similar agreement by the States or their mineral lessees. A non-discretionary duty to unitize would compel the Secretary to acquiesce in the unitization demands of the coastal States in order to meet his alleged statutory obligation (and could jeopardize economic resources and policies of the nation in the face of inappropriate or unreasonable unitization demands of the states).

Drainage Compensation Under Section 8(g)(2)

The Fifth Circuit declined to address petitioners' contention that state revenues derived from Section 8(g)(2) do not include drainage compensation, finding that the plain meaning of Section 8(g)(3), as well as the legislative history and Congressional purpose behind that statute, excludes any "duty to unitize" in the Secretary in order to compensate these petitioners for their alleged drainage losses. Petitioners complain that the avoidance of this issue by the Fifth Circuit denies them opportunity to refute its judicial reasoning by failing to specify where drainage protection to the states is assured by Section 8(g); however, it was not incumbent upon the Fifth Circuit, as it is not incumbent upon any court, to address all issues raised by the litigant if the relief which he requests is legally foreclosed on other grounds. Petitioners complain of an alleged violation of a statutory duty under Section 8(g)(3) of the OCSLA and, as previously demonstrated, the Fifth Circuit has correctly found after careful statutory analysis that there is no such duty, affirming the judgment of the District Court that no violation of Section 8(g) of the OCSLA has occurred by the defendants in this litigation.

In opposing this petition for review, respondent will accordingly not examine the statutory analysis and legislative history (including the comments in debate of Senators Murkowski of Alaska, Evans of

Washington, Bentsen of Texas and others)[20] which confirm that the revenue sharing formula in Section 8(g)(2) of the 1986 amendments includes drainage compensation.

Statutory Consequences for Alleged Violations of Section 8(g)(3)

The comment of the Fifth Circuit in its analysis of Section 8(g)(3) that Congress contemplated that the Secretary and the Governors would attempt to allocate royalty or unitize production from common reservoirs but that no statutory consequences are provided in the event of failure either to agree or to attempt to agree, is wholly consistent with the statutory analysis of the District Court which recognized Section 8(g)(3) as preserving the Secretary's license to enter into voluntary agreements with the states when advantageous to federal interests when common reservoirs are present. Both the District Court and the Fifth Circuit held that although voluntary agreements are permitted, no duty either to agree or to attempt to agree exists in the Secretary under the language of the statute. Having thus found no statutory duty, it unquestionably follows that the enforcement provisions of Section 1349 of the OCSLA cannot be applied to compel the Secretary to enter into a revenue sharing agreement with the State of Louisiana under Section 8(g)(3) of the OCSLA in order to compensate Louisiana for its alleged drainage losses.

Congressional Intent to Eliminate Litigation Over the Sharing of OCS Revenues Under Section 8(g)

In the district court, Judge Duhe observed that the legislative history of the 1978 OCSLA amendments clearly indicates that Section 8(g) as enacted in 1978 was intended to address drainage concerns. Judge Parker in the *State of Texas* litigation observed further that a

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20 Congressional debate on the 1986 amendments appears at 131 Cong. Rec. S15423-S15439 (November 14, 1985).

consideration of the purposes behind Section 8(g)(4) as enacted in 1978 leads to the conclusion that a suit for a fair and equitable division of 8(g) lease revenues under the 1978 amendments was an exclusive remedy, a result deemed consistent with the Congressional purpose of alleviating litigation-related delay of OCS development.

Despite a legislative history and judicial pronouncements which recognize Section 8(g) revenue sharing (and not mandatory unitization) as the Congressional policy choice for addressing state claims for drainage losses, Louisiana has persisted in its refusal to accept the Congressional policy choice. In the district court in this litigation, counsel for the State of Louisiana continued to assert that Section 8(g) was not a drainage statute - that the fair and equitable share of revenues to be apportioned to the State under Section 8(g) was not related to drainage or to production.[21] Louisiana's counsel stated:

> "The State has never, never in the 8(g) urged that we were being drained from Block 18 or anywhere else along the coast, because the State's position has always been that that was not the basis for Section 8(g), that the 8(g) set a fair and equitable share of all revenues, that in fact drainage would be handled by unitization on a case by case basis as it always had been."[22]

This position was, of course, rejected by Judge Duhe, who remarked:

> "Although the State's complaint in the previous litigation did not specify a drainage claim, responses to interrogatories clearly indicate that the State contended that drainage was an element of its recovery under § 8(g). Louisiana also argued that former § 8(g) compensation encompassed drainage losses in an amicus curiae filing in the appeal of the *State of Texas* litigation." [Referring to *State of Texas v. Hodel*, 84-2422, 85-9072 (5th Cir. 1985)].[23]

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21 Volume 11, Record at page 57-58.

22 Volume 14, Record at page 36-37; Volume 4, Record at page 680.

23 See 656 F. Supp. 1310 at 1317.

In its brief to the Fifth Circuit Court of Appeals, Louisiana acknowledged that drainage was an element of the 1978 Section 8(g) calculation of a "fair and equitable" distribution of proceeds.[24]

Indeed, a legislative history evidencing rejection of the joint leasing proposal in 1978 and of the Alaska forced unitization proposal in 1986 clearly demonstrates that Congress preferred revenue sharing as the means of addressing the states' drainage concerns over any mandated joint state-federal action which might impede federal OCS development or lead to litigation-related delay of that development. This litigation, by which Louisiana seeks to compel unitization across the state-federal boundary and to restrict rates of production from federal wells consistent with that proportion of the recoverable reserves which these petitioners believe underlie the federal portion of the affected reservoirs pending such unitization is an example of that Congressional wisdom. Contrary to the assertions of these petitioners, this suit to require the Secretary to comply with an alleged "duty to unitize" is very much a dispute over OCS revenues and drainage compensation.

As recognized by the District Court, through Section 8(g) Congress evidenced a policy regarding the coastal States' remedy for resource drainage by federal lessees on the OCS - that remedy is limited to participation in Section 8(g)(2) revenue sharing. In finding no support in the legislative history or under the plain meaning of the statute for petitioners' alleged "duty to unitize" under Section 8(g)(3), the Fifth Circuit acknowledged that the states are assured of substantial compensation by the provisions of Section 8(g)(2). In seeking to establish a drainage remedy which inevitably will embroil the federal judiciary in a flood of litigation to resolve unitization disputes between the sovereigns and/or their respective lessees across the federal-state OCS border, petitioners must ask this Court to

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24 Original Brief of Appellants in the United States Court of Appeals for the Fifth Circuit at page 28.

to disregard the fundamental Congressional purpose which animated both the original development of the 8(g) drainage compensation plan and the revenue sharing formula developed under the 1986 amendments designed to end disputes over state entitlements to drainage compensation or drainage protection such as the one presently before this Court.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals in this litigation, as well as that of the District Court, reflects careful analysis of the legislation at issue in this litigation, its statutory context and the Congressional policies and objectives behind the legislation. The statutory interpretation by these courts is in complete accord with the canons of interpretation adopted and approved by this Honorable Court. In reaching their decisions, both of the lower courts considered the legislative history behind Section 8(g), including that which formed the basis for petitioners' arguments in this litigation. As previously demonstrated, no conflict of analysis is presented by the decision of the Fifth Circuit Court of Appeals in this litigation. In addition, both lower courts found that the record in this case provides no support for the claims of alleged waste in Samedan's operations which petitioners suggest might follow from a failure to unitize across the federal-state OCS border. Finally, the conclusion reached by these courts does nothing to upset existing state-federal relationships but leaves in place the legislative framework under which that historical relationship has always existed.

Congress addressed the drainage problem complained of by these petitioners in Section 8(g) of the OCSLA and wisely and deliberately limited the scope of the drainage remedy to revenue sharing by the states of federal lease revenues derived from the 8(g) zone, leaving to the Secretary of the Interior complete discretion to decide when and if unitization of potentially common reservoirs is appropriate for the proper development of federal OCS resources.

For the foregoing reasons, respondent Samedan Oil Corporation submits that the decision of the Fifth Circuit Court of Appeals in this litigation is correct, that there exists no conflict of decisions and that the questions raised by this petition do not merit review by this Honorable Court. Accordingly, respondent respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be denied.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

I, RANDALL C. SONGY, counsel of record for Samedan Oil Corporation, Respondent, and a member of the bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Brief in Opposition have been served on this 15th day of March, 1988 on each of the following, in each case by deposit of the copies to be served in a United States Post Office in Lafayette, Louisiana, with first class postage prepaid, properly addressed as follows:

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No. 87-1317

4

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM J. GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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10 8

QUESTION PRESENTED

Whether Section 8(g)(3) of the Outer Continental Shelf Lands Act, as amended by Section 8003, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 149 (to be codified at 43 U.S.C. 1337(g)(3)), requires the Secretary of the Interior to enter into unitization or other forms of revenue-sharing agreements with a coastal state whenever the state requests such an agreement in order to protect itself from the alleged drainage of oil and gas by federal lessees on the outer Continental Shelf.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 832 F.2d 935. The opinion of the district court (Pet. App. C1-C56) is reported at 656 F. Supp. 1310.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on November 25, 1987. A petition for rehearing was denied on December 23, 1987 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, the Secretary of the In-

terior may issue oil and gas and other mineral leases for the submerged lands of the outer Continental Shelf (OCS). The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, grants the coastal states the right and power to manage and use the submerged lands adjoining their respective coasts. For most coastal states, including Louisiana, the grant extends seaward for three miles. Respondent Samedan Oil Corporation is the operator of a federal OCS lease, issued in 1983, for a tract adjacent to Louisiana's offshore boundary. The federal tract adjoins two state tracts that Louisiana had earlier leased to petitioners Cashco Oil Company, Seneca Resources Corporation, and Pelto Oil Company. Prior to issuing the federal lease, the Secretary offered the Governor of Louisiana the opportunity to enter into an agreement to unitize the federal tract with adjacent state lands. The Governor rejected the offer, but on April 16, 1986, he subsequently sent a letter to the Secretary requesting a unitization agreement concerning the particular tracts at issue here.

2. On April 24, 1986, petitioner Louisiana brought this action (in which petitioner state lessees subsequently intervened) against the federal government and Samedan in the United States District Court for the Western District of Louisiana. The complaint stated, inter alia, that the adjacent federal and state tracts are underlain by three individual, producing common reservoirs and that approximately 84% of the total original recoverable reserves in the three reservoirs underlie Louisiana's submerged lands and 16% underlie the federal domain (Pet. App. A5, C10). According to the complaint, Samedan, with the Secretary's acquiescence, was producing a disproportionate share of the resources (*id.* at C10-C11). The complaint alleged "that the federal government through Samedan is draining the state's mineral resources * * * in

violation of the OCSLA, 43 U.S.C § 1337(g) ('Section 8(g)'), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, Sec. 8002, which imposes a duty on the Secretary of the Interior to effect unitization of common hydrocarbon bearing areas" (Pet. 8).

The district court entered summary judgment in favor of respondents (Pet. App. C1-C56). The court concluded (*id.* at C7-C8, C19-C28) that the Secretary has discretionary authority under Section 8(g) of the OCSLA to negotiate and enter into unitization agreements or analogous royalty-sharing agreements with the states, but is not required to do so (to be codified at 43 U.S.C. 1337). The court also found (Pet. App. C7-C8, C19-C28) that Congress intended that Section 8(g)(2), which provides for a 27%-73% division between the state and federal governments, respectively, of lease revenues from oil and gas extracted on the OCS between three and six miles from the coast would generally compensate the coastal states for, among other things, drainage losses (see § 8(g)(2), as amended by Section 8003, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 148-149, to be codified at 43 U.S.C. 1337(g)(2)).

3. The court of appeals affirmed (Pet. App. A1-A40). The court concluded that the Secretary's construction of Section 8(g) is supported by both the plain meaning of Section 8(g)(3) and its legislative history. Section 8(g)(3), the court noted (Pet. App. A19-A23), is cast in permissive rather than mandatory language, and the court found (*id.* at A20-A22) that the events leading up to the 1986 revision of Section 8(g) establish that the purpose of that amendment—to settle permanently disputes over OCS revenues—would be defeated if, as petitioners contend, Section 8(g)(3) were to be interpreted as compelling the Secretary to enter into unitization agreements with coastal states.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly rejected petitioners' contention that the Secretary is required to enter into an unitization agreement with the Governor of any coastal state whenever a common potentially hydrocarbon-bearing area may underlie the federal and state boundary. The statutory language explicitly shows that the Secretary is under no such mandatory duty. Section 8(g)(3) of the OCSLA provides that "the Secretary and the Governor of the coastal State *may* enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law" (to be codified at 43 U.S.C. 1337(g)(3) (emphasis added)). The provision also expressly contemplates the possibility that no such agreement will be reached. It provides that "[i]f the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts" (*ibid.*)[1]

Furthermore, as the court of appeals recounted (Pet. App. A10-A22), the legislative history of the 1986 revision of Section 8(g)(3), which added the pertinent language, supports its literal meaning. Prior to 1986, Section 8(g) (43 U.S.C. 1337(g)) expressly required the Secretary to offer

[1]Petitioners' reliance (Pet. 17-19) on the word "shall" in the first sentence of Section 8(g)(3) is misplaced. As the court of appeals explained (Pet. App. A22 (footnotes omitted)), "[w]hile the notification requirements of section 8(g)(3) are cast in mandatory language, the revenue sharing provision is clearly permissive." Thus, the juxtaposition of the two sentences corroborates, rather than detracts from, the significance of the permissive formulation that is controlling here.

the coastal states the opportunity to enter into a revenue-sharing agreement and further required that, in the absence of such an agreement, the Section 8(g) revenues would be deposited in an escrow account pending a determination of their fair and equitable disposition by a district court. See Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 205(b), 92 Stat. 645-646. As described by the court of appeals (Pet. App. A20), however, under that statutory scheme "the Secretary and the Governors of coastal states were in constant disagreement concerning the fair and equitable disposition of OCS revenues, resulting in $6.1 billion balance in special treasury accounts." The purpose of the 1986 amendment, which eliminated those provisions, was to settle the entire Section 8(g) issue and preclude any future litigation concerning revenues from the Section 8(g) tracts (see Pet. App. A20-A21). And, specifically, as is reflected in remarks made by Senator Johnston, a sponsor of the legislation, Congress understood that the new language it was adding to Section 8(g)(3) is permissive in nature. See 131 Cong. Rec. 31911 (1985) (discussing language identical to that enacted in Section 8(g)(3)) ("Mr. President, it is a permissive right of the States to seek money. That is all they have in their amendment. There is no right granted to a State. And let us make that clear to start with."). Significantly, moreover, Congress specifically declined to adopt language that would have authorized coastal states to compel the Secretary to unitize common reservoirs (see Pet. App. A38 n.15).

Hence, there is no merit to petitioners' claim (Pet. 23-24) that the court of appeals failed to examine "the statutory context and legislative history to determine whether Congress intended to establish an affirmative

duty."[2] The court fully considered Section 8(g)(3)'s statutory context and legislative history and correctly concluded that petitioners' "construction of section 8(g)(3) would emasculate * * * clear congressional policy by engaging the courts in further litigation over revenue sharing and the determination of whether the Secretary has negotiated unitization agreements in good faith" (Pet. App. A22).[3]

Finally, likewise lacking in merit is petitioners' assertion (Pet. 28) that "[i]f Section 8(g)(3) imposes no duty on the Secretary, he has no motive to unitize in any case in which a revenue advantage can be gained through drainage." As petitioners concede (Pet. 12), "[h]istorically, problems of net drainage across federal-state boundaries have been met through a practice of unitization of common reservoirs by federal and state agencies." In the absence of any statutory obligation, the Secretary and Louisiana entered into numerous unitization agreements long before the 1978 and 1986 Amendments were enacted (see *id.* at 13). Although the Secretary has, as in this case, decided not to enter into reciprocal revenue-sharing agreements with Louisiana on a piecemeal tract-by-tract basis, he remains interested in

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[2] For this reason, contrary to petitioners' claim (Pet. 4, 19-24), the decision of the court of appeals in this case does not create an "analytical conflict" with either the First Circuit's decision in *Massachusetts* v. *Andrus,* 594 F.2d 872 (1979) or the Tenth Circuit's decision in *Nevada Power Co.* v. *Watt,* 711 F.2d 913 (1983). Neither of those decisions concerned the meaning of "may" in Section 8(g)(3).

[3] Petitioners mischaracterize their claim in asserting (Pet. 35) that "[t]his is not a dispute over OCS revenues or compensation." The second sentence of Section 8(g)(3), upon which petitioners rely, concerns federal-state agreements "to divide the *revenues* from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement" (to be codified at 43 U.S.C. 1337(g)(3) (emphasis added)). Hence, petitioners' claim is, at bottom, a dispute over Section 8(g) revenues.

reaching an agreement with Louisiana that covers substantial portions of the state-federal boundary.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1988

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[4] In a letter to the Governor of Louisiana dated May 1, 1987, the Assistant Secretary of the Interior – Land and Minerals Management, stated that Interior had decided not to compel unitization of Samedan's tract, but added (U.S. C.A. Br. Attachment 3):

> We remain open, however, to exploring with your State a general, reciprocal royalty-sharing agreement under section 8(g)(3) of the OCS Lands Act whenever common reservoirs are not unitized and substantial net drainage cannot be counteracted through our other regulatory authorities. This agreement could apply to common ununitized State/Federal reservoirs in the West Delta 17 field. A royalty-sharing agreement is, in effect, a unitization of the lessors' royalty interests. The rights of the lessees under their leases remain unaffected. A royalty-sharing agreement is a means of protecting the fiscal interests of both sovereigns in those cases when compelled unitization is inappropriate.

Louisiana has, throughout the course of this litigation, carefully avoided any admission that Section 8(g)(3) imposes any obligation upon it to unitize or to enter into revenue-sharing agreements with the Secretary where the State's lessees are draining resources from federal OCS lands.

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REPLY BRIEF OF PETITIONERS

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LIST OF PARTIES

The following additional petitioners are not listed in the caption: Cashco Oil Company, Seneca Resources Corporation and Pelto Oil Company. These parties were intervenors in the case below and joined the Petition for Certiorari before this Court and also join this Reply Brief.

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INTRODUCTORY COMMENT

Respondents, Samedan Oil Corporation ("Samedan") and the United States of America, the Department of the Interior, and the Minerals Management Service (the "federal respondents"), have submitted Briefs in Opposition to the Petition for Writ of Certiorari. This reply brief is submitted to address issues raised in the Respondents' Briefs.

ARGUMENT

The Brief in Opposition filed on behalf of Samedan raises in the first instance before this court the regulations of the Secretary of the Interior regarding offshore operations on federal lands.[1] Notably absent from this recitation are the Secretary's regulations for

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1 See pages 11-13 of Samedan's Brief In Opposition.

unitization of state/federal lands. Such regulations are nonexistent.

The OCSLA states in pertinent part as follows:

> The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provision herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter . . . . The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions--

* * *

(4) For unitization, pooling, and drilling agreements[2]

The Secretary is obligated, by §8(g)(3), to undertake a diligent good faith effort to effectuate an agreement with a state where drainage is occurring across a state/federal boundary and is obligated, by §1334(a), to establish regulations to that end. As regards the West Delta properties, the Secretary has failed to enter such good faith negotiations and, as part of his synergistic program for avoidance of his statutory obligation, he has also failed to promulgate any regulations regarding the procedures, protocol, criteria or standards to be utilized when a common potentially hydrocarbon-bearing area is

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2 43 USC 1334(a).

determined by the governor of a coastal state to exist.

The Secretary's obligation for the promulgation of regulations as set forth in 43 USC §1334(a) indicates first that the Secretary shall provide regulations with regard to unitization and second that the Secretary is to prescribe, when it is "necessary and proper," regulations providing for the conservation of OCS natural resources, prevention of waste and protection of correlative rights. Even absent this conflict, the Secretary cannot contend that the issuance of regulation for these situations is not "necessary and proper". The establishment of such regulations would clearly be in the best federal interests for the conservation of OCS natural resources, protection of correlative rights and prevention of

waste. Still no regulations have even been proposed.

The Respondents argue that Louisiana has not provided a definitive explanation of how the mechanics of the Secretary's obligations under §8(g)(3) would be performed. They further raise the specter that adoption of the Petitioners' position would result in the federal judiciary assuming a type of technical adminstrative status in unitization cases. These arguments are mere subterfuge and misdirection of the judiciary's attention from the fact that it is not incumbent upon the Petitioners or the courts to formulate such procedures. Rather, it is incumbent upon the Secretary to prescribe those procedures in a regulatory program as called for by Section 8(g)(3) and Section 1334(a).

The Secretary utterly disregarded Section 8(g)(3) prior to commencement of this litigation. The Secretary has occasionally confected, solely for the purposes of his arguments herein, self-serving correspondence to assert his recognition of the existence of the statutory provision. Some of these documents are now being cited by Respondents as probative evidence of the Secretary's consideration of the critical issues.[3] Despite lip-service to the statute, the Secretary's functioning administrative policy is unchanged from that he has espoused from the commencement

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[3] The correspondence referenced in footnote number 4 on page 7 of the Federal respondents' Brief in Opposition reflects that the Secretary has summarily rejected unitization for coastal waters at the Louisiana/federal border. Petitioners assert that were it not for the present action, the Secretary would never have acted in any fashion (even in his present erroneous manner) to address any rights across state/federal borders.

of this litigation, to wit: Section 8(g)(3) may be ignored.

The brief of the federal respondents contains yet another shift of statutory interpretation by the Secretary. When he testified on the proposed bill before the Senate Energy Committee, he described Section 8(g)(3) as a mandatory provision.[4] After the passage of the bill, the Secretary ignored Section 8(g)(3) in his dealings with the Petitioners prior to commencement of this litigation. Then, he said that Section 8(g)(3) is absolutely discretionary and that he did not want to confect an agreement. Now, he says that he does not want to do an agreement on a "piecemeal tract-by-tract basis" but is interested in an agreement affecting "substantial portions"

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4 See Pet. App. pages 25-26 for the complete text of Secretary Hodel's comment.

of state-federal leases.[5] One is puzzled by whether the Secretary's latest shift is influenced more by recognition of statutory duty or by a belated recognition that refusal to unitize is a two-way street, perhaps brought sharply to his attention by recently discovered common reservoirs in which Louisiana is draining the United States. Regardless of the motivation, the Secretary's conduct highlights the folly of his legal position that 8(g)(3) will be used when it is beneficial to the United States but will not be utilized if the

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5 See pages 6-7 of the brief of the Federal respondents and the accompanying footnote number 4.

situation benefits Louisiana.[6] Such a high-handed and inequitable operating policy would remove any motivation Louisiana might have to use the unitization process. Thus, the arbitrary refusal of the Secretary to act pursuant to Section 8(g)(3) has brought to an end an era of state-federal cooperation in OCS development. Even prior to the passage of the 1978 version of Section 8(g), both sovereigns entered voluntary agreements

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[6] In footnote number 4 on page 7 of their brief, the Federal respondents claim that Louisiana has avoided stating that the obligations of Section 8(g)(3) are imposed upon the coastal states as well as the Federal government. This statement is totally incorrect. On page 16 of the Reply Brief filed by Petitioners in the Fifth Circuit Court of Appeals proceeding, the Petitioners stated: "The appellants [Petitioners] have long recognized and stated that Section 8(g)(3) has bilateral effects and protects both sovereigns from the inequitable effects of drainage." In truth, it is the Federal respondents who have claimed that the provision is one-sided.

motivated by good faith and mutual respect. The Secretary's refusal to honor Section 8(g)(3) removes even the pre-1978 unitization incentives and introduces a new era of confrontation, rather then cooperation.

The Respondents further assert that the Secretary is vested with "absolute discretion," unreviewable by the judiciary. This position is untenable, particularly in light of the failure of the Secretary to establish any procedures, protocol, criteria or standards to address the state/federal unitization issue.[7] The

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[7] In Mendoza v. Secretary of Health and Human Services, 655 F.2d 10, 13 (1st Cir. 1981), the court refuted this administrative approach.

> The [statutory] phrase [at issue] . . . could conceivably mean that the Secretary has unbridled discretion . . . . But discretion does not usually include the right to act arbitrarily or without

(continued)

Secretary thus urges an unconscionable result wholly abrogating the correlative rights of coastal states and affected parties in certain instances and those of the United States in others.[8]

On page two of their brief, the federal respondents state that the Governor of Louisiana rejected an "offer" to unitize the subject property pursuant to the 1978 version of Section 8(g). A reference to the Governor's decision,

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criteria. Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 507 (4th Cir. 1973).

8 As of this filing, drainage is occurring off of Louisiana's coast across state/federal borders at various locations. In this instance, drainage favors the federal government and its lessees. However, there are other reservoirs common to Louisiana and federal leases in which the drainage favors the state. Absent unitization of those common reservoirs, the United States will not be protected from drainage, thus depriving it of substantial revenues it would have otherwise earned for the production of its natural resources.

without an explanation of the historical and legal context, is extremely misleading. At the time the "offer" was made, the coastal states and the federal government were litigating the issue of whether the 1978 Section 8(g) provided compensation for "drainage only", as claimed by the federal government, or whether it included compensation to coastal states for economic and environmental effects of OCS operations, as claimed by the coastal states. The "offer" was rejected because it was a ploy to force the state into accepting the "drainage only" theory. The federal respondents' suggestion of a different motive for the Governor's rationale in rejecting the "offer" ignores the true reason for his declining it.

The federal respondents' claim that the 1986 version of 8(g) was designed to

"settle the entire Section 8(g) issue" and therefore preclude this litigation[9] conveniently ignores an explanation of just what was the "entire Section 8(g) issue". The lengthy and expensive litigation over the 1978 version of 8(g) was to determine whether the states were entitled to compensation for the economic and environmental effects of OCS operations. The federal government contended that Section 8(g) was designed only to compensate the coastal states for drainage of their natural resources.[10] Therefore, the issue that Congress intended to resolve with the 1986 legislation was the affirmation that the coastal states would receive benefits for

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[9] Page 5 of Federal respondents' Brief.

[10] State of Texas v. Secretary of the Interior, 580 F.Supp. 1197 (E.D. Tex. 1984).

the economic and environmental damages caused by OCS operations. The legislative tool for this resolution is Section 8(g)(2) which expressly states that the payments thereunder are for such purposes. Section 8(g)(3), therefore, exists to protect the sovereigns from drainage. In the tremendous volume of pleadings filed in this case, the respondents have never refuted the clear, unequivocal words of Senator Bentsen when he said of the 1986 legislation:

> "[B]oth the State and Federal oil and gas will be protected from drainage by unitization or other royalty sharing agreement".[11]

Respondents assert the Fifth Circuit undertook detailed analysis of the legislative history to reach their statutory interpretation. This is

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11 131 Cong. Rec. S15429 (daily ed. November 14, 1985) (statement of Sen. Bentsen).

false. The opinion of the Fifth Circuit reflects cursory review of the statute on a facial reading only without consideration of pertinent Congressional statements.[12] Such cursory review is unconsistent with proper judicial procedure as stated in Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 104 S.Ct. 439, 444-5 (1983) in which this court held:

> . . . while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, NLRB v. Iron Workers, supra, 434 U.S., at 350, 98 S.Ct., at 660, they must not "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory

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12 See e.g., the statement of Senator Bentsen quoted above, and those of Secretary Hodel and the House Merchant Marine & Fisheries Committee recited at pages 25-26, Pet. App. These statements have gone unaddressed and unrefuted by the Fifth Circuit and by the Respondents. The reliance on the statement by Senator Johnston is unwarranted since his comment was taken out of context.

mandate or that frustrate the congressional policy underlying a statute." NLRB v. Brown, 380 U.S. 278, 291-292, 85 S.Ct. 980, 988-989, 13 L.Ed.2d 839 (1965). See Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166, 92 S.Ct. 383, 390, 30 L.Ed.2d 341 (1971).

The Brief in Opposition filed by Samedan continually addresses legislative history and judicial pronoucements on the 1978 version of Section 8(b). All such references are wholly irrelevant to 1986 Section 8(g) issues. Further, the Respondents and the Fifth Circuit meticulously avoid reference to any 1986 Section 8(g) legislative history other than a bill drafted by the Alaskan delegation which, in fact, was never introduced and was not, as Respondents claim, rejected by Congress. Respondents' strategy of avoiding substantive discussion of the 1986 legislative history is

sound. The relevant legislative history is damning to their arguments.[13]

Both the brief of Samedan and that of the federal respondents raise the issue that this is a suit over "revenues." It is not; it is a suit to achieve unitization by enforcement of Section 8(g)(3). The ultimate outcome of a unitization order is a delineation of the pro rata distribution of production attributable to owners of interests within the unitized area. While this litigation may effect a mandate for commencement of unitization proceedings, the distribution of revenues is not at issue here. The interpretation of statutory obligations is the issue.

CONCLUSION

Section 8(g)(3) provides specific directives to the Secretary of the

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[13]See Pet. App. at pages 24-27.

Interior for the resolution of drainage conflicts brought about by the discovery of common reservoirs of oil and gas spanning state/federal borders in coastal waters.

In this matter the Secretary of the Interior has made no diligent good faith effort to comply with the Congressional purposes embodied in Section 8 (g)(3). To the contrary, the Secretary has approached his duties under Section 8(g)(3) as "absolutely discretionary," thus effectively excising Section 8(g)(3) from the legislation. In his evisceration of that section from the OCSLA, the Secretary has further assured his unwillingness to comply with Congressional policy, notwithstanding possible rulings and pronouncements of the judiciary, by failing to provide any regulatory mechanism for effectuation of a uniti-

zation agreement even if he should decide to exercise his "absolute discretion" and seek a unitization solution.

Based on the foregoing and the previously submitted petition, the Petitioners urge this Court to issue a Writ of Certiorari to the Fifth Circuit Court of Appeal for review of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT L. BOESE, Counsel of Record for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the foregoing Reply Brief of Petitioners have been served on this 26th day of April, 1988, on each of the following, in each case by deposit of the copies to be served in a United States post office in Lafayette, Louisiana, with first class postage prepaid, properly addressed as follows:

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It is hereby certified that all parties required to be served with the foregoing Reply Brief of Petitioners have been listed and served as of this 26th day of April, 1988, in the manner described hereinabove.

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